

RESOLUTION NO. 2004-25506

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, WAIVING, BY 5/7THS VOTE, THE COMPETITIVE BIDDING REQUIREMENT, FINDING SUCH WAIVER TO BE IN THE BEST INTEREST OF THE CITY, AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A CONCESSION AGREEMENT BY AND BETWEEN THE CITY OF MIAMI BEACH AND PENROD BROTHERS, INC., FOR THE MANAGEMENT AND OPERATION OF A CONCESSION IN THAT PORTION OF PIER PARK SEAWARD OF THE FOOTPRINT OF THE PENROD'S RESTAURANT, LOCATED AT ONE OCEAN DRIVE, MIAMI BEACH, FLORIDA; SAID AGREEMENT HAVING AN INITIAL TERM OF TWO (2) YEARS, SEVEN (7) MONTHS AND SIX (6) DAYS, COMMENCING RETROACTIVELY ON OCTOBER 1, 2003, AND EXPIRING ON MAY 6, 2006, WITH AN OPTION TO RENEW TO RUN CONCURRENTLY WITH THE TERM OF THAT CERTAIN LEASE AGREEMENT ENTITLED, "LEASE AGREEMENT BETWEEN THE CITY OF MIAMI BEACH AND PENROD BROTHERS, INC. FOR A PIER PARK RESTAURANT FACILITY"; PROVIDED FURTHER THAT SAID CONCESSION AGREEMENT IS TERMINABLE BY THE CITY WITHOUT CAUSE AND FOR CONVENIENCE, UPON 180 DAYS WRITTEN NOTICE TO PENROD'S

WHEREAS, on October 2, 1985, the Mayor and City Commission adopted Resolution No. 85-18222, approving a Concession Agreement, dated November 7, 1985, between the City and Penrod Brothers, Inc. (Penrod's) for the rental of beach equipment, water recreation equipment and food and beverage service at Pier Park, Oceanfront Park, and Lummus Park, and the respective beachfront areas seaward thereof, for a period of fifteen (15) years (the Penrod's Concession Agreement); and

WHEREAS, on October 2, 1985, the Mayor and City Commission also adopted Resolution No. 85-18223, approving a Lease Agreement, dated November 7, 1985, between the City and Penrod's for the development, construction and operation of a restaurant and associated uses at Pier Park for a term of twenty (20) years, with two (2) additional ten (10) year options automatically renewable at Penrod's discretion (the Pier Park Restaurant Lease Agreement); and

WHEREAS, the Penrod's Concession Agreement, as amended, was scheduled to expire on November 4, 2000; however on October 18, 2000, the Mayor and City Commission, in order to allow for the issuance of a Request for Proposals (RFP) for the future operation of beachfront concessions on the beaches seaward of Lummus Park, Ocean Terrace and North Shore Open Space Park, approved an amendment to said Concession Agreement, providing, in part, for a one year extension; to expire on November 4, 2001; and

WHEREAS, said RFP did not include the portion of Pier Park, or the beaches seaward thereof; and

WHEREAS, said RFP was awarded to Boucher Brothers Miami Beach LLC, as the successful proposer, and a new concession agreement was approved by the Mayor and City Commission and became effective on November 5, 2001; and

WHEREAS, the Boucher Brothers' concession agreement did not include the portion of Pier Park and the beaches seaward thereof formerly addressed within the Penrod's Concession Agreement, including the immediate area directly adjacent to the Pier Park Restaurant Lease Premises; and

WHEREAS, Penrod's subsequently entered into discussions with the City and (as it had always serviced that area through the Penrod's Concession Agreement) requested that the City permit it to continue servicing patrons in the portion of the Pier Park area east of its restaurant and the beaches seaward thereof; and

WHEREAS, in response to Penrod's request, the Administration reviewed the matter and concluded that, as Penrod's was the original developer and long term Lessee of the upland Pier Park Restaurant, it would be in the best interest of the City to have the same operator (Penrod's) continue to provide concession services and operations, as were formerly provided by Penrod's when it controlled the subject area pursuant to the Penrod's Concession Agreement; and

WHEREAS, the Administration has successfully negotiated the attached Concession Agreement with Penrod Brothers for the operation and management of a concession for lounging equipment rentals and food and beverage sales, in the portion of Pier Park seaward of the footprint of the Pier Park Restaurant Lease Premises; and

WHEREAS, the Concession Agreement is for an initial term of two (2) years, seven (7) months and six (6) days, commencing retroactively on October 1, 2003, and expiring on May 6, 2006, with an option to renew to run concurrent with the term of the Pier Park Restaurant Lease Agreement; and

WHEREAS, said Concession Agreement is terminable for convenience by the City, at its discretion, and without cause, upon 180 days written notice to Penrod's; and

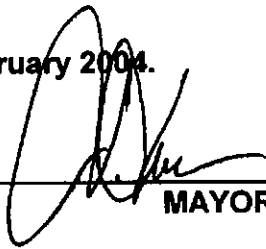
WHEREAS, the Administration would recommend that the Mayor and City Commission further waive, by 5/7^{ths} vote, the competitive bidding requirement, finding such waiver to be in the best interest of the City, and approve the attached Concession Agreement.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and City Commission herein waive, by 5/7^{ths} vote, the competitive bidding requirement, finding such waiver to be in the best interest of the City, and approve and authorize the Mayor and City

Clerk to execute the attached Concession Agreement by and between the City and Penrod Brothers, Inc., for the management and operation of a concession in that portion of Pier Park seaward of the footprint of the Penrod's Restaurant, located at One Ocean Drive, Miami Beach, Florida; said Agreement having an initial term of two (2) years, seven (7) months and six (6) days, commencing retroactively on October 1, 2003, and expiring on May 6, 2006, with an option to renew to run concurrently with the term of that certain Lease Agreement entitled, "Lease Agreement between the City of Miami Beach and Penrod Brothers, Inc. for a Pier Park Restaurant Facility"; provided further that said Concession Agreement is terminable by the City without cause and for convenience, upon 180 days written notice to Penrod's.

PASSED AND ADOPTED THIS 25th day of February 2004.


CITY CLERK


MAYOR

JMG:CMC:JD:rlr

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**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**


City Attorney  2-20-04
Date

**CITY OF MIAMI BEACH
COMMISSION ITEM SUMMARY**



Condensed Title:

A Resolution, Waiving, By 5/7ths Vote, the Competitive Bidding Requirement, Authorizing A Concession Agreement Between The City And Penrod Brothers, For The Operation Of A Concession In Pier Park Seaward Of The Footprint Of The Penrod Pier Park Restaurant; Commencing Retroactively On October 1, 2003, And Expiring On May 6, 2006, With An Option To Renew To Run Concurrently With The Term Of The Existing Pier Park Restaurant Lease Agreement ; Said Concession Agreement Is Terminable By The City Without Cause And For Convenience, With 180 Day Notice

A Resolution Authorizing A Third Amendment To The Lease Agreement Between The City And Penrod Brothers For The Pier Park Restaurant Facility", Located At One Ocean Drive; Said 3rd Amendment Increasing The Percentage Rent Due To The City And Correcting Scrivener's Errors In Exhibits "A" (Site Plan) And "B" (Legal Description) To The Lease Agreement

Issue:

Shall the City Commission approve 1) the Concession Agreement, and 2) a Third Amendment to the Lease Agreement with Penrod Brothers for the Pier Park Locations?

Item Summary/Recommendation:

1) A Concession Agreement for the rental of lounging equipment and providing food and beverage service in the Pier Park Concession Area, including the following: Term: Commencing retroactively on 10/01/03, and ending on 05/06/06, with an option to renew to run concurrent with the term of the Pier Park Restaurant Lease Agreement. Option: If there is no default, there are two (2) automatically renewable ten (10) year options, unless Penrod Brothers advises the City, in writing, at least 6 months prior to the expiration of the preceding term. In the event that the Pier Park Restaurant Lease Agreement option is not exercised by Penrod Brothers, or the Lease Agreement is otherwise terminated, the Concession Agreement shall automatically terminate. City Reserves right to terminate for convenience, at its discretion and without cause, with 180 day notice. Remuneration: City to receive 5.5% of gross receipts from all sales and services within the Leased Premises and the Pier Park Concession Area, effective October 1, 2003. Rate increases to 6.5% upon Penrod's achieving a target revenue threshold of \$12,818,026 (avg. of FY2002 & FY2003 gross receipts). Retroactive Remuneration: City will receive retroactive remuneration of 5.5% of Gross Receipts, for the period from 11/1/01- 09/30/03 totaling \$767,533; \$400,000 in cash over next 3 months, and \$367,533 in capital improvements within the Concession Area and Pier Park (includes public restroom facility and exterior park access signage). Penrod will also invest a minimum of \$500,000, in additional capital improvements within the Concession Area or the Pier Park Restaurant. In the event an economic downturn Penrod Brothers may opt to irrevocably forfeit the Concession Area and revert from the proposed 5.5% (6.5%) rate models, to the 3.5% rate provided in its original Pier Park Restaurant Lease Agreement, and the new Concession Agreement would be null and void, as would the concurrent Third Amendment to the Lease Agreement, and Penrod would restore the Park to the City's satisfaction.

2) The 3rd Amendment to Pier Park Restaurant Lease is required to amend the percentage rent provisions consistent with the Concession Agreement and correct exhibits related to the footprint of Leased Premises. The Administration recommends that the Mayor and City Commission Adopt the Resolutions.

Advisory Board Recommendation:

N/A

Financial Information:

Source of Funds:	Amount	Account	Approved
<input type="checkbox"/>	1		
<input type="checkbox"/>	2		
<input type="checkbox"/>	3		
<input type="checkbox"/>	4		
Finance Dept.	Total		

City Clerk's Office Legislative Tracking:

Christina Cuervo/Joe Damien

Sign-Offs:

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Department Director	Assistant City Manager	City Manager
	<i>Cyle</i>	<i>R. B. [Signature]</i>

AGENDA ITEM **R7D**

DATE **2-25-04**

CITY OF MIAMI BEACH

CITY HALL 1700 CONVENTION CENTER DRIVE MIAMI BEACH, FLORIDA 33139
<http://ci.miami-beach.fl.us>



COMMISSION MEMORANDUM

TO: Mayor David Dermer and
Members of the City Commission

DATE: February 25, 2004

FROM: Jorge M. Gonzalez
City Manager

SUBJECT: A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, WAIVING, BY 5/7THS VOTE, THE COMPETITIVE BIDDING REQUIREMENT, FINDING SUCH WAIVER TO BE IN THE BEST INTEREST OF THE CITY, AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A CONCESSION AGREEMENT BY AND BETWEEN THE CITY OF MIAMI BEACH AND PENROD BROTHERS, INC., FOR THE MANAGEMENT AND OPERATION OF A CONCESSION IN THAT PORTION OF PIER PARK SEAWARD OF THE FOOTPRINT OF THE PENROD'S RESTAURANT, LOCATED AT ONE OCEAN DRIVE, MIAMI BEACH, FLORIDA; SAID AGREEMENT HAVING AN INITIAL TERM OF TWO (2) YEARS, SEVEN (7) MONTHS AND SIX (6) DAYS, COMMENCING RETROACTIVELY ON OCTOBER 1, 2003, AND EXPIRING ON MAY 6, 2006, WITH AN OPTION TO RENEW TO RUN CONCURRENTLY WITH THE TERM OF THAT CERTAIN LEASE AGREEMENT ENTITLED, "LEASE AGREEMENT BETWEEN THE CITY OF MIAMI BEACH AND PENROD BROTHERS, INC. FOR A PIER PARK RESTAURANT FACILITY"; PROVIDED FURTHER THAT SAID CONCESSION AGREEMENT IS TERMINABLE BY THE CITY WITHOUT CAUSE AND FOR CONVENIENCE, UPON 180 DAYS WRITTEN NOTICE TO PENROD'S

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A THIRD AMENDMENT TO THAT CERTAIN LEASE AGREEMENT ENTITLED, "LEASE AGREEMENT BETWEEN THE CITY OF MIAMI BEACH AND PENROD BROTHERS, INC. FOR A PIER PARK RESTAURANT FACILITY", FOR USE OF THE PROPERTY LOCATED AT ONE OCEAN DRIVE, MIAMI BEACH, FLORIDA; SAID THIRD AMENDMENT INCREASING THE PERCENTAGE RENT DUE TO THE CITY AND CORRECTING SCRIVENER'S ERRORS IN EXHIBITS "A" (SITE PLAN) AND "B" (LEGAL DESCRIPTION) TO THE AGREEMENT

ADMINISTRATION RECOMMENDATION:

Adopt the Resolutions

ANALYSIS:

On October 2, 1985, the Mayor and City Commission adopted Resolution No. 85-18222, approving a Concession Agreement, dated November 7, 1985, between the City of Miami Beach and Penrod Brothers, Inc. (Penrod's) for the operation and management of beachfront concessions, including

rental of beach equipment, water recreation equipment, and food and beverage service at Pier Park, Oceanfront Park, and Lummus Park, and the beaches seaward thereof.

Concurrently, on October 2, 1985, the Mayor and City Commission also adopted Resolution No. 85-18223, approving a Lease Agreement, dated November 7, 1985, between the City and Penrod's for the development, construction and operation of a restaurant and associated uses at Pier Park for a term of twenty (20) years, with two (2) additional ten (10) year options automatically renewable at Penrod's discretion (the Pier Park Restaurant Lease Agreement).

The Concession Agreement, which was amended on August 13, 1986, via Resolution No. 86-18539 (Amendment No. 1), on September 4, 1986, via Resolution No. 86-18571 (Amendment No. 2), and April 20, 1988, via Resolution No. 88-19223 (Amendment No. 3), was to expire on November 4, 2000. On October 18, 2000, the Mayor and City Commission adopted Resolution No. 2000-24137, approving Amendment No. 4 to the Concession Agreement, extending its term for a period of one year (terminating November 4, 2001), to allow for the issuance of a Request for Proposals (RFP) for the future operation of beachfront concessions on the beaches seaward of Lummus Park, Ocean Terrace, and North Shore Open Space Park.

On February 21, 2001, the Mayor and City Commission authorized the Administration to issue RFP No. 22-00/01 for the management and operation of beachfront concessions limited to the beaches seaward of Lummus Park, Ocean Terrace and North Shore Open Space Park (the RFP). As a result of input received from local merchant associations, and the general public at various public meetings and workshops, and because Penrod's leased the upland portion of Pier Park for a term of forty (40) years, said RFP was issued without the inclusion of the beaches east of Pier Park and Oceanfront Park, which had previously been included in the 1985 Concession Agreement with Penrod's.

Responses to the RFP were received, evaluated and recommendations regarding same were forwarded to the Mayor and City Commission. On October 17, 2001, the Mayor and City Commission approved and awarded a new concession agreement to Boucher Brothers Miami Beach LLC, as the successful proposer, which became effective on November 5, 2001. In accordance with the provisions of the RFP, the Boucher Brother's concession agreement did not include the beaches seaward of Pier Park, or those portions of the park east of, and immediately adjacent to the Pier Park Restaurant Leased Premises formerly addressed under the 1985 Penrod's Concession Agreement.

Penrod subsequently approached the City and entered into discussions regarding a request to continue servicing patrons (as it had always serviced that area through the 1985 Concession Agreement) in the portion of the Pier Park area east of its Pier Park Restaurant, as well as the beaches seaward thereof. In response to Penrod's request, the Administration reviewed the matter and concluded that, since Penrod's was the original developer and long term Lessee of the upland Pier Park Restaurant, it would be in the best interest of the City to have the same operator (Penrod's) continue to provide concession services and operations, as were formerly provided by Penrod's when it controlled the subject area pursuant to the 1985 Penrod's Concession Agreement.

In light of the foregoing, negotiations were commenced for two separate concession agreements: 1) one for the beaches seaward of the dunes east of Pier Park, and 2) one for the area east of the Pier Park Restaurant Leased Premises (Concession Area).

A. BEACHFRONT CONCESSION AGREEMENT:

On November 28, 2001, the Mayor and City Commission adopted Resolution NO. 2001-24678, waiving by 5/7^{ths} vote, the competitive bidding requirement and authorizing the City Administration and City Attorney's Office to negotiate and execute a new beachfront concession agreement with Penrod's for the management and operation of beachfront concessions on the beaches seaward of the dunes east of Pier Park, substantially in accordance with the following terms and conditions. The beachfront concession agreement provides for an annual concession fee to the City of the greater of:

- 1) \$10,000, which is the maximum that is being charged to concessions east of privately owned uplands, or
- 2) 15% of the gross receipts Penrod's derives from its beachfront concession operations. (Note: food and beverage revenue will continue to be reported and remitted by Penrod's through its currently existing Lease Agreement for the Pier Park Restaurant, located at 1 Ocean Drive).

Additionally, all other provisions of the beachfront concession agreement are consistent with other concession agreements associated with beaches seaward of privately owned upland locations, and as such will require that Penrod's comply with all aspects of the City's Rules and Regulations for Beachfront Concession Operations.

B. PIER PARK CONCESSION AGREEMENT:

The Administration has been negotiating with Penrod's on several outstanding issues including:

- the use of area between the footprint of the Pier Park Restaurant and the dune (Concession Area),
- the percentage of revenue to be paid to the City (both retroactively and in the future)
- that the Concession Area be completely open and accessible to the public

Said negotiations have been successfully concluded, resulting in the attached Concession Agreement, for the operation and management of a concession for lounging equipment rentals and food and beverage sales, in the portion of Pier Park seaward of the footprint of the Pier Park Restaurant Lease Premises, substantially with the following terms and conditions:

- 1) Term:
The Concession Agreement is to run concurrent with the term of the Lease Agreement for the Pier Park Restaurant Facility. Accordingly, this Concession Agreement shall be for an initial term of two (2) years, seven (7) months and six (6) days, commencing retroactively on the first day of October, 2003, and ending on the sixth day of May, 2006, with an option to renew to run concurrent with the term of the Pier Park Restaurant Lease Agreement.

- 2) Option:
Provided that the Penrod's as Concessionaire or Lessee under the Pier Park Restaurant Lease Agreement, is not in default, this Concession Agreement shall have two (2) ten (10) year options for renewal. Such options shall be considered automatically renewed unless Penrod's advises the City Manager, in writing, at least six (6) months prior to the expiration of the preceding term that it does not wish to exercise the option.

Additionally, in the event that Penrod's, as Lessee under the Pier Park Restaurant Lease Agreement, does not exercise its option to renew said Lease Agreement, or said Lease Agreement is terminated, for any reason whatsoever, then this Concession Agreement shall automatically terminate.

- 3) Termination for Convenience:
Notwithstanding the initial term or option terms above, the Concession Agreement is terminable for convenience by the City, at its discretion, and without cause, upon 180 days written notice to Penrod's.

- 4) Financials:
The financial issues are addressed as three separate items: i) Financial remuneration going forward from the commencement date of the Concession

Agreement; ii) Retroactive remuneration (in cash and capital improvements) for the period from November 5, 2001 to September 30, 2003; and iii) Other capital improvements to Concession Area and/or Leased Premises.

i) **Remuneration:**

Penrod's has agreed to remit to the City a rate of 5.5% of gross revenue derived from all sales and services both within the Lease Premises and the Pier Park Concession Area, effective as of October 1, 2003. Said rate shall increase to 6.5% upon evidence of Penrod's achievement of a target revenue threshold equal to the average of the fiscal year 2002, and fiscal year 2003 annual gross receipts, said average has been calculated at \$12,818,026.

ii) **Retroactive Remuneration:**

Penrod's has agreed to the following retroactive remuneration payable to the City, based on a 5.5% rate of Gross Receipts, for the period from November 1, 2001 through September 30, 2003, totaling \$767,533, as follows:

ii-a) \$400,000 in cash, payable to the City in accordance with the following schedule:

- i. \$100,000 already received by the City on February 6, 2004
- ii. \$100,000 no later than April 1, 2004
- iii. \$100,000 no later than May 1, 2004
- iv. \$100,000 no later than May 31, 2004

ii-b) The remaining balance of \$367,533 is to be applied towards capital improvements within the Concession Area and Pier Park, including but not limited to design and construction of an outdoor public restroom facility to service Pier Park patrons and exterior signage at each entranceway to the Park to be approved by the City.

iii) **Other Capital improvements:**

Penrod's will also make capital improvements, in an amount not less than \$500,000, either within the Concession Area or within the Pier Park Restaurant Leased Premises.

5) **Reverter In The Event Of Economic Downturn:**

In the event there is a downturn in the economy that would directly create a financial situation that could not be overcome using the proposed 6.5% rate model, Penrod's may, with proper advance notice, to the City, opt to irrevocably forfeit the Concession Area; revert to payment of its original 3.5% rate provided in its original Pier Park Restaurant Lease Agreement. The new Concession Agreement entered into with regard to the Concession Area would be null and void, as would be the concurrent Third Amendment to the Lease Agreement; Penrod's would return to the legal description under the original Lease Agreement (which only includes the footprint of the Pier Park Restaurant); and the Concession Area would be restored by Penrod's to a satisfactory condition, as determined by the City.

6) **Operational and Land Use Issues:**

- a) No cover may be charged for patrons entering the Concession Area as said area will remain and continue to be treated as public park property.
- b) Amount of foliage, landscaping buffers, and number of lounging beds, chairs, tables and other barriers has been reduced to ensure that there are clear paths of access to the Concession Area, as well inclusion of adequate signage indicating that the Concession Area is part of Pier Park, and as such

is open and fully accessible to the public, whether or not a member of the public wishes to partake in the concession services offered by Penrod's or not. The intent of the parties is to modify, reduce and/or remove obstacles and barriers that would limit public access and foster the perception of "privatization" of the Concession Area and to ensure that the Pier Park property remain accessible to the public from all sides. A detailed site plan is attached to the Concession Agreement for the City's review and approval, and Penrod's will be responsible to undertake any and all further corrective work.

- c) Storage areas and storage of equipment along the north property line of the Park have been addressed and included as part of the aforementioned site plan.
- d) A comprehensive hurricane evacuation plan, including off-site storage of chairs, tables, lounge chairs, and any and all temporary structures, has been provided.
- e) Signage at all frontages of the Concession Area (Ocean Drive, beachside, north side by Bently Beach and south side on street end) shall be erected indicating that it is a public park area and public beach access is available.
- f) Consumption of alcohol within the Concession Area will be permitted, but sale and/or dispensing of alcohol (i.e. placement of bars or other dispensing facilities) within the park will not be permitted.
- g) A fee schedule detailing the proposed rates for lounge equipment rentals, subject to the City's approval, will be submitted by Penrod's.
- h) Any special events and/or film and print activities taking place within the Concession Area will be subject to all applicable permitting requirements, including the City's Special Event guidelines. Any revenues derived from said activities, or any other business operations conducted within the Concession Area, will be considered as part of the gross receipts pursuant to the Concession Agreement and Lease Agreement, as amended.

7) Eventuality of Non-Agreement to Business Terms:

In the event that this Concession Agreement is not approved, Penrod's has agreed, at its sole cost and expense, to restore the area to a condition satisfactory to the City, as a public park, within a time period established by the City.

8) Lease Agreement Amendment:

In accordance with the financial terms agreed to in the Pier Park Concession Agreement, the parties need to amend similar terms governing percentage rent in the Pier Park Restaurant Lease Agreement. The Pier Park Restaurant Lease Agreement is being concurrently amended as follows:

- a) Penrod's shall remit to the City a rate of 5.5% of gross receipts derived from all sales and services within the Pier Park Restaurant Leased Premises (as well as the Pier Park Concession Area), retroactively effective as of October 1, 2003. Said rate shall increase to 6.5% upon evidence of Penrod Brother's achievement of a target revenue threshold equal to the average of the fiscal year 2002 and fiscal year 2003 annual gross receipts, said average has been calculated at \$12,818,026.

Additionally, the City and Penrod's wish to correct a long-standing scrivener's error in the exhibits to the Pier Park Restaurant Lease Agreement

referencing the building footprint (site plan) and the legal description, to correspond with the position of the building as actually constructed, but in no way materially altering or expanding the square footage and/or size of the Leased Premises; and

C. LEGAL ANALYSIS:

The City Attorney's Office has carefully scrutinized the attached Concession Agreement and Third Amendment to Lease Agreement for compliance with the applicable Miami-Dade County and City Charter provisions governing disposition of park property, as follows:

1) MIAMI-DADE COUNTY CHARTER (ARTICLE 6):

Article 6 of the Miami-Dade County Charter, entitled "Parks, Aquatic Preserves, and Preservation Lands", generally requires that there shall be no permanent structures or commercial advertising erected in a public park or private commercial use of a public park or renewals, expansions, or extensions of existing leases, licenses, or concessions to private parties of public park property, unless each such structure, lease, license, renewal, expansion, extension, concession, or use shall be approved by a majority vote of the voters in a County-wide referendum. Notwithstanding the preceding sentence, however, Section 6.02 therein, entitled "Restrictions and exceptions", provides that the provisions of Article 6 (including the aforesated restrictions) **shall not** apply to "mini and neighborhood parks"; except that mini or neighborhood parks may not be leased or sold unless a majority of the residents residing in voting precincts any part of which is within 1 mile of the subject mini or neighborhood park authorize such sale or lease by majority vote in an election.

Section 33H-3 of the Miami-Dade County Code defines a "mini park" as one "which has small passive open space areas typically less than one acre in size... ." A "neighborhood park" is defined as a park "which is typically from one (1) to ten (10) acres in size and considered a walk-to facility...."

Pier Park, in its entirety, is approximately between 4-5 acres; the proposed concession area contemplated herein is a little over an acre. For purposes of Article 6 of the County Charter, Pier Park falls within the County's definition of a "neighborhood park." Thus, if the transaction was a sale or lease of the area it would be subject to approval by a vote of residents residing in precincts with one mile. The Concession Agreement in no way contemplates a sale or lease of Pier Park. Penrod's is merely being given the right to operate a concession service, providing beach rental and food and beverage services within a designated concession area in an approximately one (1) acre portion of the Park. Additionally, the Concession Agreement is terminable without cause and for the City's convenience, upon 180 days prior notice to Penrod's.

The proposed Third Amendment to Lease Agreement, only has the effect of (i) memorializing the renegotiated financial terms between the parties, and (ii) correcting a long standing scrivener's error in the legal description of the property. No extension or expansion of the Lease Premises is involved, and the said Premises continue to reflect the boundaries of the Restaurant facility, as constructed pursuant to the original 1985 Lease Agreement. The 1985 Lease Agreement itself predates the effective date of Article 6 of the County Charter. Article 6 states that it "shall not be construed to illegally impair any previously existing valid written contractual commitments or bid bonds or bonded indebtedness."

2) MIAMI BEACH CHARTER (SECTION 1.03(b)):

Section 1.03(b) of the Miami Beach City Charter, entitled "Alienability of property", provides that the "the only limitation concerning alienability of City-owned property is

the restriction of the sale, exchange, conveyance or lease of five (5) years or longer (including option periods) of park, recreation, or waterfront property in the City of Miami Beach while it is being used for such public purpose, unless such sale, exchange, conveyance or lease is approved by a majority vote of the voters in a City-wide referendum.

As the proposed Third Amendment to Lease Agreement does not contemplate any sale, exchange, conveyance, or lease of the Lease Premises, beyond the rights conveyed in the 1985 Lease Agreement, Section 1.03(b) of the City Charter does not apply.

The proposed Concession Agreement does not contemplate a sale, exchange or lease of the concession area. The sole determination is whether the Concession Agreement is a "conveyance," as contemplated under Section 1.03(b) of the City Charter.

The Agreement specifically states that neither a leasehold interest or any other property interest is intended to be conveyed through the Concession Agreement. The Agreement merely grants Penrod's the privilege and/or license to provide certain services consistent with beachfront concession operations, as well as the sale of food and beverages, upon the concession area. The Agreement further requires Penrod's to acknowledge that said services must be provided within the context of a public park and that, as such, the concession area is open and available to the public. The transaction does not grant Penrod's any sort of property right typically associated with a fee interest, created by either a sale or exchange of property, or a leasehold interest. The rights granted by the Concession Agreement are more in keeping with the rights granted pursuant to the issuance of a license and, like a license, those rights are revocable upon 180 days notice to Penrod's.

Although Section 1.03(b) of the City Charter does not define the term "conveyance", Article II of the City Code, which governs the sale or lease of City property, and which sets forth stringent requirements to be complied with prior to the sale and/or lease of City property (including but not limited to, competitive bidding; Planning Department analysis, appraisal; and public hearing), does define the term. In Article II, Section 82-36, which defines what constitutes a "sale" of City property for purposes of applying the requirements of Article II, a sale is defined as "**any conveyance, transfer, gift, exchange or other transaction in which legal title passes from the City to any person or entity...**" [Emphasis Supplied]. Further, Section 82-36 also specifically **exempts** concession agreements from compliance with the City Code procedures governing sale/lease of City property. Finally, Merriam-Webster's Collegiate Dictionary (9th ed. 1991), defines a "conveyance" as "an instrument by which title to property is conveyed...".

Section 1.03(b) of the City Charter is intended to impose an additional level of scrutiny, beyond the requirements for sale and/or lease of City property in Article II of the City Code, with regard to the disposition of park and waterfront property in the City. However, upon reading the definition of the term "conveyance" in Article II, Section 82-36, as well as Webster's definition of a "conveyance", it is clear that the type of "conveyance" intended to trigger the requirements of Section 1.03(b) is one where the intent is that the City convey legal title or a leasehold interest of five (5) years or more to another entity. The attached Concession Agreement does not rise to the level prescribed by Section 1.03(b) of the Charter and is similar in nature to the numerous beachfront concessions which exist and have existed in the past.

The Administration recommends that that the Mayor and City Commission waive by 5/7ths vote, the competitive bidding requirements, finding such waiver to be in the best interest of the City, and 1) approve a Concession Agreement by and between the City of Miami Beach and Penrod Brothers,

Inc., for the rental of lounging equipment and for providing food and beverage service in the Pier Park Concession Area, Miami Beach, Florida, and 2) approve a third Amendment to the Lease Agreement between the City of Miami Beach and Penrod Brothers, Inc. for the restaurant property, also located at One Ocean Drive, Miami Beach, Florida.

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Penrod Brothers, Inc. Concession Agreement

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**CONCESSION AGREEMENT BETWEEN
CITY OF MIAMI BEACH, FLORIDA AND
PENROD BROTHERS, INC. FOR
MANAGEMENT AND OPERATION OF A CONCESSION
IN A PORTION OF PIER PARK**

THIS CONCESSION AGREEMENT made the 25th day of February, 2004, between the **CITY OF MIAMI BEACH**, a municipal corporation of the State of Florida (hereinafter called "City"), having its principal address at 1700 Convention Center Drive, Miami Beach, Florida, 33139, and **PENROD BROTHERS, INC.**, a corporation of the State of Florida, with offices at One Ocean Drive, Miami Beach, Florida, 33139 (hereinafter called "Concessionaire").

WITNESSETH

WHEREAS, on October 2, 1985, the Mayor and City Commission adopted Resolution No. 85-18222, approving a Concession Agreement, dated November 7, 1985, between the City and Penrod Brothers, Inc. (Penrod's) for the rental of beach equipment, water recreation equipment and food and beverage service at Pier Park, Oceanfront Park, and Lummus Park, and the respective beachfront areas seaward thereof, for a period of fifteen (15) years (the Penrod's Concession Agreement); and

WHEREAS, on October 2, 1985, the Mayor and City Commission also adopted Resolution No. 85-18223, approving a Lease Agreement, dated November 7, 1985, between the City and Penrod's for the development, construction and operation of a restaurant and associated uses at Pier Park for a term of twenty (20) years, with two (2) additional ten (10) year options automatically renewable at Penrod's discretion (the Pier Park Restaurant Lease Agreement); and

WHEREAS, the Penrod's Concession Agreement, as amended, was scheduled to expire on November 4, 2000; however on October 18, 2000, the Mayor and City Commission, in order to allow for the issuance of a Request for Proposals (RFP) for the future operation of beachfront concessions on the beaches seaward of Lummus Park, Ocean Terrace and North Shore Open Space Park, approved an amendment to said Concession Agreement, providing, in part, for a one year extension; to expire on November 4, 2001; and

WHEREAS, said RFP did not include the portion of Pier Park, or the beaches seaward thereof; and

WHEREAS, said RFP was awarded to Boucher Brothers Miami Beach LLC, as the successful proposer, and a new concession agreement was approved by the Mayor and City Commission and became effective on November 5, 2001; and

WHEREAS, the Boucher Brothers' concession agreement did not include the portion of Pier Park and the beaches seaward thereof formerly addressed within the Penrod's Concession Agreement, including the immediate area directly adjacent to the Pier Park Restaurant Lease Premises; and

WHEREAS, Penrod's subsequently entered into discussions with the City and (as it had always serviced that area through the Penrod's Concession Agreement) requested that the City permit it to continue servicing patrons in the portion of the Pier Park area east of its restaurant and the beaches seaward thereof; and

WHEREAS, in response to Penrod's request, the Administration reviewed the matter and concluded that, as Penrod's was the original developer and long term Lessee of the upland Pier Park Restaurant, it would be in the best interest of the City to have the same operator (Penrod's) continue to provide concession services and operations, as were formerly provided by Penrod's when it controlled the subject area pursuant to the Penrod's Concession Agreement; and

WHEREAS, the Administration has successfully negotiated the attached Concession Agreement with Penrod Brothers for the operation and management of a concession for lounging equipment rentals and food and beverage sales, in the portion of Pier Park seaward of the footprint of the Pier Park Restaurant Lease Premises; and

WHEREAS, the Concession Agreement is for an initial term of two (2) years, seven (7) months and six (6) days, commencing retroactively on October 1, 2003, and expiring on May 6, 2006, with an option to renew to run concurrent with the term of the Pier Park Restaurant Lease Agreement; and

WHEREAS, said Concession Agreement is terminable for convenience by the City, at its discretion, and without cause, upon 180 days written notice to Penrod's; and

WHEREAS, the Administration would recommend that the Mayor and City Commission further waive, by 5/7th vote, the competitive bidding requirement, finding such waiver to be in the best interest of the City, and approve the attached Concession Agreement.

NOW THEREFORE, in consideration of the premises and the mutual covenants and conditions herein contained and other good and valuable consideration, the receipt and adequacy of which are hereby conclusively acknowledged, it is agreed by the parties hereto as follows:

The City hereby grants to the Concessionaire, and the Concessionaire hereby accepts from the City, the exclusive right to operate the following described concession within a portion of the City owned property known as Pier Park, located at One Ocean Drive, in conformance with the purposes and for the period stated herein and subject to all the terms and conditions herein contained and fairly implied by the terms hereinafter set forth.

SECTION 1. TERM.

- 1.1 It is the intent of the parties that the term of this Agreement, including any renewal terms, is to run concurrent with the term of that certain Lease Agreement entitled; "Lease Agreement between the City of Miami Beach and Penrod Brothers, Inc. for a Pier Park Restaurant Facility", dated November 7, 1985. Accordingly, this Concession Agreement shall be for an initial term of two (2) years, seven (7) months and six (6) days, commencing retroactively on the first day of October, 2003 (the "Commencement Date"), and ending on the sixth day of May, 2006. For purposes of this Agreement the contract years for the initial term shall be defined as follows:

Year 1: October 1, 2003 – May 6, 2004;
Year 2: May 7, 2004 – May 6, 2005; and
Year 3: May 7, 2005 – May 6, 2006

- 1.2 Provided that the Concessionaire is not in default under Section 13 hereof, and provided further that the Concessionaire, as Lessee, is not in default pursuant to the terms and conditions of that certain lease agreement dated November 7, 1985, entitled, "Lease Agreement between the City of Miami Beach and Penrod Brothers, Inc. for a Pier Park Restaurant Facility" (Pier Park Restaurant Lease Agreement), this Concession Agreement shall have two (2) ten (10) year options for renewal. Such options shall be considered automatically renewed unless Concessionaire advises the City Manager, in writing, at least six (6) months prior to the expiration of the preceding term that Concessionaire does not wish to exercise the option.

Renewal term contract years shall commence on May 7, and end on May 6th of the following year.

Additionally, in the event that Concessionaire, as Lessee under the Pier Park Restaurant Lease Agreement, does not exercise its option to renew said Lease pursuant to Paragraph 3 of said Lease Agreement, then this Concession Agreement shall automatically terminate, and shall be null and void and of no further force and effect. Additionally, if, at any time during the term of this Concession Agreement, the Pier Park Restaurant Lease Agreement is terminated or otherwise ceases to be of any legal force and effect, for whatever reason whatsoever, then this Concession Agreement shall automatically terminate, and shall be null and void and of no further force and effect.

SECTION 2. CONCESSION AREA.

- 2.1 The portion of the City owned property known as Pier Park subject to this Concession Agreement is specifically described in Exhibit A, hereto attached and incorporated herein (herein after referred to as Concession Area).
- 2.2 Notwithstanding the Concession Area granted to Concessionaire above, Concessionaire herein understands, agrees, and acknowledges that the aforestated Concession Area, along with any and all other public park area

not specifically identified herein, are public and, as such, must remain available for the use and enjoyment of the general public whether or not the public chooses to use any of Concessionaire's facilities, equipment, purchase its products, or engage in any of the services it provides. In the event that a member of the public is within the Concession Area, or desires access to the Concession Area, as set forth herein, Concessionaire agrees to allow for his/her access and continued peaceful enjoyment of said Area. Concessionaire shall at no time charge an admission fee for entry and/or access to the Concession Area.

SECTION 3. USE(S).

The Concessionaire is hereby authorized to conduct the following kind(s) of businesses and provide the following kind(s) of services within the Concession Area, as provided below; all at its sole cost and expense:

3.1 Rental of Lounging and Related Equipment.

This shall generally include the rental of lounge chairs and related lounge seating, including but not limited to, beds, settees, divans, lounge "teepees", and related pads, cushions, umbrellas and sun canopies (collectively, lounging and related equipment). The City herein approves the rental of lounging and related equipment, as defined in the preceding sentence and the prices for same; all as set forth in Exhibit 3.1, attached hereto and incorporated herein. Any amendments to Exhibit 3.1, whether as to type(s) of equipment to be rented or as to changes in prices for same, must be approved in writing by the City Manager or his designee prior to such changes being implemented within the Concession Area, and a new updated Exhibit 3.1 will be incorporated into this Agreement.

3.1.1 The design, type, material, and color of any and all lounging and related equipment, as defined above, shall be submitted to and approved in writing by the City Manager or his designee prior to execution of this Agreement by the parties hereto. A photo or photos of such City approved lounging and related equipment is incorporated herein and attached hereto as Exhibit 3.1.1. Thereafter, Concessionaire shall not change, alter, or modify said City approved design, type, material and color of any beach equipment without the prior written consent of the City Manager or his designee, and, if so approved, an updated Exhibit 3.1.1 will be made a part of and incorporated into this Agreement.

3.1.2 Prior to execution of this Agreement by the parties hereto, Concessionaire shall also submit for approval, in writing, by the City Manager or his designee, the prices to be charged for rental of such lounging and related equipment, as shall have been approved by the City Manager and/or his designee, pursuant to Section 3.1 above, and such approved prices shall be incorporated and attached hereto as Exhibit 3.1.

- 3.1.3 Any amendments to Exhibit 3.1, whether as to type(s) of lounging and related equipment to be rented or as to changes in prices for same, must be approved in writing by the City Manager and/or his designee prior to such changes being implemented within the Concession Area, and a new updated Exhibit 3.1 will be submitted and incorporated into this Agreement. Notwithstanding the foregoing required approval by the City Manager and/or his designee, Concessionaire may increase the prices to be charged for rental of such lounging and related equipment by an amount equal to the percentage increase in the Consumer Price Index, All Urban Consumers (CPI-U) U.S. City Average for the previous contract year or years as published by United States Department of Labor, Bureau of Labor Statistics, with the baseline established as October 2003; however, prior to implementation of such increase, Concessionaire shall provide City with a new updated Exhibit 3.1, as required in the preceding sentence. Concessionaire agrees that any such increases shall not be permitted to occur more than once per contract year.
- 3.1.4 The set up of lounging and related equipment to be placed within the Concession Area shall be placed substantially in accordance to a site plan, which shall be approved by the City Manager and/or his designee and attached hereto and incorporated herein as Exhibit 3.1.4. Concessionaire shall not deviate from or alter the approved site plan(s) without the prior written consent of the City Manager or his designee.
- 3.1.5 The parties acknowledge that Concessionaire's patrons may themselves relocate lounging and related equipment within the Concession Area. Such relocation shall be permitted, provided that, in the aggregate, Concessionaire does not materially alter, or allow to be materially altered, the configuration of the Concession Area, as set forth in the site plan approved pursuant to Exhibit 3.1.4. In the event of this occurrence, Concessionaire shall immediately correct any material alteration within the Concession Area to bring same back into substantial compliance with the approved site plan.
- 3.1.6 The condition and quality of Concessionaire's lounging and related equipment shall at all times be maintained in a manner that is consistent with the condition and quality of first class concession equipment located on public beaches adjacent to world class beach resorts. It is the City's intent, and Concessionaire hereby agrees and acknowledges same, to develop and promote world class public concession facilities and operations. Accordingly, Concessionaire shall not only, at a minimum, maintain all lounging and related equipment placed within the Concession Area in usable condition, but shall adhere, as indicated in this Subsection, to high ongoing maintenance standards for same. Within thirty (30) days of execution of this Agreement by the parties hereto, Concessionaire shall provide City with a full inventory of all lounging and related equipment contemplated for use herein, including types and numbers (per item);

dates of lease and/or purchase; and initial condition, established as of the date of inventory. Thereafter, City and Concessionaire shall jointly prepare a plan and schedule for the ongoing replacement and/or updating of lounging and related equipment throughout the term of this Agreement, and a new inventory shall be submitted by Concessionaire to the City.

3.2 Food and Beverage Service.

- 3.2.1 Concessionaire shall offer for sale within the Concession Area, such food and beverages which, at a minimum, are consistent with the type and quality of food and beverages prepared and sold within the Pier Park Restaurant Facility, as provided pursuant to the terms and conditions of the Pier Park Restaurant Lease Agreement. However, actual cooking and heating within or on the Concession Area shall not be allowed, other than the cooking of food on a temporary, non-permanent barbeque grill, which shall be approved, in writing, by the City on a case-by-case basis, prior to implementation of same on the Concession Area.
- 3.2.2 All food and beverages sold or otherwise offered within the Concession Area will be subject to any and all terms and conditions governing food and beverage service under the Pier Park Restaurant Lease Agreement and shall be dispensed only from the Pier Park Restaurant Facility.
- 3.2.3 The City herein allows Concessionaire the right to serve and sell alcoholic beverages within the Concession Area, for consumption on the premises, subject to Concessionaire's compliance, at all times, with whatever restrictions and/or regulations are or may be imposed by the State of Florida, Miami-Dade County, and/or the City, with respect to the dispensing and sale of alcoholic beverage, as well as, alcoholic beverage license requirements. Notwithstanding the preceding sentence, all alcoholic beverages shall be dispensed only from the Pier Park Restaurant Facility, and Concessionaire shall not be permitted to erect or maintain upon the Concession Area, any permanent or temporary structure and/or area for the dispensing or sale of alcoholic beverages (i.e.: bars, mini bars, etc.).

3.3 Construction of Concession Storage Facility.

- 3.3.1 City herein allows Concessionaire to construct a storage facility, to be utilized by Concessionaire for the sole purpose of storing Concession Area lounging and related equipment, tables and chairs, and any and all other equipment and or items to be utilized for the purpose of operating and maintaining the Concession Area; said storage facility to be located in that area of the Concession Area on the northern side of the Pier Park Restaurant Facility, and further such specific location subject to the prior written approval of the City Manager or his designee, and to be specifically identified on Exhibit A to this

Concession Agreement. Any and all costs associated with the design, permitting and any required approvals, construction, and maintenance shall be at the sole cost and expense of the Concessionaire.

- 3.3.2 Concessionaire shall be solely responsible for obtaining all approvals from the City and any other regulatory agencies, including approvals by the City in its regulatory capacity.
- 3.3.3 Concessionaire shall submit to City, acting in its proprietary capacity as owner of the property, plans and specifications for the Storage Facility, to be submitted to the City Manager or his designee for his review and approval.
- 3.3.4 Following review and approval of the plans and specifications, Concessionaire shall seek and obtain any and all necessary approvals and permits, including but not limited to, a building permit for construction of the proposed facility.
- 3.3.5 Concessionaire shall not commence construction until all necessary permits and approvals for construction of the facility are issued, and, following commencement shall thereafter continue to prosecute construction of the Storage Facility with diligence and continuity to completion.
- 3.3.6 Substantial completion of the Storage Facility shall be completed no later than six (6) months from the issuance of a building permit for same.
- 3.3.7 Upon expiration or termination of this Concession Agreement ownership of the Storage Facility shall vest in the City of Miami Beach and the City shall have the right to possession of same.
- 3.3.8 Concessionaire herein acknowledges, represents and warrants that any cost associated with the construction of the aforestated Storage Facility shall not be considered part of, nor applied to, the required Concessionaire's Capital Improvements (CCI), as set forth in Subsection 4.6 of this Agreement.

3.4 Hurricane Evacuation Plan.

Concessionaire agrees that all its facilities, equipment and any and all other items used in the concession operations will be removed from the Concession Area immediately within eight (8) hours of the issuance of a Hurricane Warning by the Miami-Dade County Office of Emergency Management, and stored at an approved location. Prior to execution of this Agreement by the parties hereto, Concessionaire shall provide the City Manager or his designee with a hurricane preparedness/evacuation plan, which shall include the location of its proposed off-site hurricane storage facility.

3.5 City Occupational Licenses.

Concessionaire shall obtain, at its sole cost and expense, any occupational licenses required by City law, as amended from time to time, for the proposed uses contemplated in Section 3 of the Agreement. Concessionaire will be required to obtain two (2) occupational licenses for: (i) Rental of lounging and related equipment; (ii) Food and Beverage Service.

SECTION 4. CONCESSION FEES.

4.1 Minimum Guarantee (MG):

In consideration of the City's execution of this Agreement and grant of the rights provided herein, commencing retroactively on October 1, 2003, and thereafter on May 7 of each contract year during the initial term of the Agreement, as well as any renewal terms, the Concessionaire shall pay to the City a Minimum Guaranteed Annual Concession Fee (MG) equal to a percentage of Concessionaire's gross receipts. The MG shall be payable as monthly percentage rent to the City by the fifteenth (15) day of each month for the preceding month, and said payment shall be accompanied by a statement of gross receipts for the preceding month. At the time of delivery to the City of the Annual Statement of Gross Receipts, as required pursuant to Section 6, Concessionaire shall also pay to the City any adjustment due the City.

4.1.1 For purposes of calculation of any increase of MG, as set forth below, and any other term and condition of this Agreement relating to the MG, the base dollar amount used shall be the original MG contemplated in this Agreement for the first contract year, which is \$400,000. At the commencement of the second contract year, or May 7, 2004, the MG shall be automatically increased, by five percent (5%) per year, from the previous year's MG. At the commencement of the fourth contract year, or May 7, 2006, and every fourth contract year thereafter, the City shall review Concessionaire's annual gross receipts and recalculate the MG to an amount equal to seventy-five (75%) percent of six and one half (6.5%) percent of the prior three (3) contract year averages of gross receipts. Said adjusted MG shall be payable as set forth in this Section 4.1, and the annual five (5%) percent increase shall continue to apply to the recalculated MG amount.

4.1.2 For each contract year, in the event that the amount equal to six and one half (6.5%) percent of Concessionaire's gross receipts, as such term is defined in the Pier Park Restaurant Lease Agreement, as amended, does not meet the MG amount, as established pursuant to Subsection 4.1.1, then the Concessionaire shall also pay an additional lump-sum amount to the City, equal to the difference between the percentage of gross receipts amount and the MG amount provided in Subsection 4.1.1 above; said amount payable in full at the time of delivery to the City of the Annual Statement of Gross Receipts, or no later than June 30, of each contract year during the term, including renewal terms, of this Agreement.

4.1.3 The parties agree to amend Paragraph 13 of the Pier Park Restaurant Lease Agreement by increasing Penrod's percentage rent due to the City to a maximum of six and one half (6.5%) percent of "gross receipts", as said term is defined in Subsection 4.1.4 , and in the amendment to the Pier Park Restaurant Lease Agreement. Notwithstanding the preceding sentence, the agreement of the parties, as reflected in Subsection 4.2.1, shall also apply to the Pier Park Restaurant Lease Agreement, as amended.

4.1.4 The term "gross receipts" is understood to mean all income, whether collected or accrued, derived by Penrod's (whether as Concessionaire under this Agreement or as Lessee under the Pier Park Restaurant Lease Agreement), or any licensee, sub-concessionaire, or sub-tenant of Penrod's (whether as Concessionaire under this Agreement or as Lessee under the Pier Park Restaurant Lease Agreement), from all business conducted upon or from the Concession Area or the "Premises", as such term is defined in the Pier Park Restaurant Lease Agreement, including but not limited to receipts from sale of food, beverages, alcoholic beverages, rental of lounging and related equipment, sale of merchandise, rental of space, including percentage rents, or from any other source whatsoever. The term "gross receipts" shall exclude amounts of any Federal, State, or City sales tax, or other governmental imposition, assessment, charge or expense of any kind, collected by the Concessionaire and required by law to be remitted to the taxing or other governmental authority.

4.2 Prorated MG for First Contract Year.

Notwithstanding anything contained in Subsection 4.1, City and Concessionaire agree that the MG for the first contract year (the first contract year being defined as the period from October 1, 2003 through May 6, 2004) shall be Two Hundred Thirty Nine Thousand Three Hundred Forty Four (\$239,344) Dollars. This sum represents the prorated amount based upon the annual base MG of four hundred thousand (\$400,000) dollars.

4.2.1 Notwithstanding Subsection 4.1.2, upon commencement of the Agreement, and effective retroactively to October 1, 2003, Concessionaire shall make a monthly MG payment in an amount equal to five and one half (5.5%) percent of Concessionaire's gross receipts. The monthly 5.5% MG payment amount shall be increased to the required six and one half (6.5%) percent MG payment amount (Subsection 4.1.2), upon the City's sole determination that Penrod's, both as Concessionaire under this Agreement and as Lessee under the Pier Park Restaurant Lease Agreement, has achieved the "target revenue threshold"; said term herein defined as the amount equal to the average of the Fiscal Year (FY) 2001/2002 (October 1-September 30) and Fiscal Year 2002/2003 gross receipts (as said term is defined in Subsection 4.1.4).

The parties agree that the target revenue threshold is herein established as the sum of \$12,818,026. This sum is based on the

average of gross receipts for FY 2001/2002, which equals the sum of \$12,222,358, and FY 2002/2003 gross receipts, which equals \$13,413,695.

- 4.2.2 Upon Concessionaire's achievement of the target revenue threshold, Concessionaire shall pay the lump sum amount to the City, equal to the difference between the 5.5% and 6.5% for the contract year in which the target revenue threshold was met; said amount payable in full at the time of delivery to the City of Concessionaire's Annual Statement of Gross Receipts. Thereafter, Concessionaire shall continue to make MG payments in the required amount of 6.5% of Concessionaire's gross receipts, as provided by this Section.

4.3 Retroactive Remuneration.

In addition to the amount set forth in Subsection 4.2, Concessionaire agrees to pay City the sum of Seven Hundred Sixty Seven Thousand Five Hundred Thirty Three (\$767,533) Dollars representing the parties' agreed upon retroactive remunerations for the period from November 1, 2001 through September 30, 2003. Said retroactive remuneration shall be payable as follows:

- i) \$400,000 to be payable as follows:

prior to execution of this Agreement	-	\$100,000
April 1, 2004	-	\$100,000
May 1, 2004	-	\$100,000
May 31, 2004	-	\$100,000
- ii) The remaining balance of Three Hundred Sixty Seven Thousand Five Hundred Thirty Three (\$367,533) Dollars to be applied to a portion of Concessionaire Capital Improvements, as set forth in Subsection 4.6.

4.4 Interest for Late Payment.

Any payment which Concessionaire is required to make to City which is not paid on or before the respective date provided for in this Agreement shall be subject to interest at the rate of twelve percent (12%) per annum, from the due date of payment until such time as payment is actually received by the City.

4.5 Sales and Use Tax.

It is also understood that the required Florida State Sales and Use Tax shall be added to Concessionaire's payments and forwarded to the City as part of said payments. It is the City's intent that it is to receive all payments due from Concessionaire as net of such Florida State Sales and Use Tax.

4.6 Concessionaire's Capital Improvements (CCI).

- 4.6.1 As a further inducement for the City to enter into this Agreement, Concessionaire shall, at its sole cost and expense, agree to make a minimum investment in capital improvements, in an amount not less

than \$500,000, either within the Concession Area or within the "Premises", as said term is defined in the Pier Park Restaurant Lease Agreement.

4.6.2 In addition to the capital improvements required in Subsection 4.6.1, Concessionaire shall satisfy the balance of the Retroactive Remuneration, as required in Subsection 4.3(ii), by making capital improvements within the Concession Area, in amount not less than \$367,533. Notwithstanding the preceding sentence, said capital improvements must, at a minimum, include the design and construction, at Concessionaire's sole cost and expense, of an outdoor public restroom facility to service Pier Park patrons and exterior access signage. In the event that Federal, State or local permitting requirements prohibit the construction of the restroom facility within the Concession Area, then the parties shall mutually agree to construct said restroom facility in another area within Pier Park.

4.6.3 Any and all capital improvements contemplated in Subsections 4.6.1 and 4.6.2 shall first be agreed to and approved by the City and shall, at a minimum, be compatible with the current design and use of the Concession Area and Premises, and relate to Penrod's operation and management of same. Upon the parties execution of this Agreement, Concessionaire shall, within thirty (30) days, for the storage facility contemplated pursuant to Subsection 4.6.1, and within ninety (90) days for the CCI's contemplated pursuant to Subsection 4.6.2, submit a detailed proposal to City, for its review, outlining the proposed capital improvements within the Concession Area and/or Premises; costs for each improvement(s); time frame for completion.

4.6.4 Following written approval of Concessionaire's proposed capital improvement(s), the parties agree to coordinate and cooperate in the planning, permitting, scheduling, and approval of the design, construction and operation of same. Concessionaire shall undertake and complete the design, development, permitting and approval, and construction of any agreed upon capital improvement(s), in such time, order and manner as City and Concessionaire may mutually agree upon.

4.6.5 Notwithstanding anything contained in this Subsection 4.6, it shall be Concessionaire's sole responsibility, cost, and expense to design, develop, obtain permits and approvals, construct, and maintain and operate all approved capital improvement(s). Concessionaire further acknowledges, and herein represents and warrants, that the City shall not be obligated to fund any costs related to any approved capital improvement(s), including maintenance and operation costs.

4.7 Reverter in the Event of Economic Downturn.

In the event that Concessionaire deems that, as a result of a downturn in the economy, a financial hardship has occurred for Concessionaire such that

Concessionaire is no longer financially able to remit the MG amount required in Subsection 4.1.1 of the Agreement, Concessionaire shall provide the City Manager with a minimum of one hundred eighty (180) days written notice of its intent to terminate this Concession Agreement as a result of changed economic circumstances. Upon termination of the Agreement, City and Concessionaire agree to amend the Pier Park Restaurant Lease Agreement, if required, to provide that (i) Concessionaire shall no longer be required to pay the 6.5% MG amount under the Lease, and (ii) that Concessionaire shall resume payment under the Pier Park Restaurant Lease Agreement of the maximum amount equal to 3.5% of gross receipts (said 3.5% amount being the amount referenced in the Lease prior to execution of this Agreement by the parties).

Additionally, upon termination of the Agreement pursuant to this Subsection 4.7, Concessionaire shall immediately surrender the Concession Area and restore same to a satisfactory condition, as shall be determined solely by the City in its reasonable discretion and judgment.

SECTION 5. MAINTENANCE AND EXAMINATION OF RECORDS.

Concessionaire shall maintain current, accurate, and complete financial records on an accrual basis of accounting related to its operations pursuant to this Agreement. Systems and procedures used to maintain these records shall include a system of internal controls and all accounting records shall be maintained in accordance with generally accepted accounting principles and shall be open to inspection and audit, but not photocopying, by the City Manager or his designee upon reasonable prior request and during normal business hours. Such records and accounts shall include a breakdown of gross receipts. Concessionaire shall maintain accurate receipt-printing cash registers or a like alternative, which will record and show the payment for every sale made or service provided; and such other records shall be maintained as would be required by an independent CPA in order to audit a statement of annual gross receipts pursuant to generally accepted accounting principles.

A monthly report of gross receipts must be submitted to the City, through the Finance Department's Revenue Supervisor, to be received no later than fifteen (15) days after the close of each month, certified by Concessionaire to be true, accurate and complete.

SECTION 6. INSPECTION AND AUDIT.

Concessionaire shall maintain its financial records pertaining to its operations for a period of three (3) years after the conclusion of any contract year and such records shall be open and available to the City Manager or his designee, as deemed necessary by the City Manager or his designee, but shall not be subject to photocopying. Concessionaire shall maintain all such records at its principal office, currently located at One Ocean Drive, Miami Beach, Florida, 33139, or, if moved to another location, all such records shall be relocated, at Concessionaire's expense, to a location in Miami Beach, within ten (10) days' written notice from the City.

The City Manager or his designee shall be entitled to audit and photocopy, Concessionaire's gross receipts records pertaining to its operation as often as it deems

reasonably necessary throughout the term of this Agreement, and three (3) times within the three (3) year period following termination of the Agreement, regardless of whether such termination results from the natural expiration of the term or for any other reason. The City shall be responsible for paying all costs associated with such audits, unless the audit(s) reveals a deficiency of five percent (5%) or more in Concessionaire's statement of gross receipts for any year or years audited, in which case the Concessionaire shall pay to the City, within thirty (30) days of the audit being deemed final (as specified below), the cost of the audit and a sum equal to the amount of the deficiency revealed by the audit, plus interest; provided, however, the audit shall not be deemed final until Concessionaire has received the audit and has had a reasonable opportunity to review the audit and discuss the audit with the City. Nothing contained within this Section shall preclude the City's audit rights for resort tax collection purposes.

Within sixty (60) days after each contract year, Concessionaire shall submit to City a written Annual Statement of Gross Receipts for such contract year. Said Annual Statement shall be an audited statement of gross receipts, in a form consistent with generally accepted accounting principles.

It is Concessionaire's intent to stay informed of comments and suggestions by the City regarding Concessionaire's performance under the Agreement. Within thirty (30) days after the end of each contract year, Concessionaire and City may meet to review Concessionaire's performance under the Agreement for the previous contract year. At the meeting, Concessionaire and City may discuss quality, operational, maintenance and any other issues regarding Concessionaire's performance under the Agreement.

SECTION 7. TAXES, ASSESSMENTS, AND UTILITIES.

- 7.1 Concessionaire agrees to and shall pay before delinquency all taxes (including but not limited to resort taxes) and assessments of any kind assessed or levied upon Concessionaire by reason of this Agreement or by reason of the business or other activities of Concessionaire under this Agreement. Concessionaire will have the right, at its own expense, to contest the amount or validity, in whole or in part, of any tax and/or assessment by appropriate proceedings diligently conducted in good faith. Concessionaire may refrain from paying a tax or assessment to the extent it is contesting the assessment or imposition of same in a manner that is in accordance with law; provided, however, if, as a result of such contest, additional delinquency charges become due, Concessionaire shall be responsible for such delinquency charges, in addition to payment of the contested tax and/or assessment if so ordered.

Concessionaire shall also pay for any fees imposed by law for licenses or permits for any business or activities of Concessionaire upon the Concession Area(s) under this Agreement.

Concessionaire shall pay before delinquency any and all charges for utilities used by, for, or on behalf of the operations contemplated herein (including, but not limited to, water, electricity, gas, heating, cooling, sewer, telephone, trash collection, etc.).

7.2 Procedure If Ad Valorem Taxes Assessed.

Notwithstanding Subsection 7.1 above, the parties agree that the operations contemplated within the Concession Area are for public purposes and, therefore, no ad valorem taxes should be assessed by the Miami-Dade County Tax Appraiser. If, however, said taxes are assessed, Concessionaire shall be solely responsible for payment of same.

SECTION 8. EMPLOYEES AND INDEPENDENT CONTRACTORS.

8.1 In connection with the performance of its responsibilities hereunder, Concessionaire may hire its own employees and/or independent contractors, who will be employees and/or independent contractors of Concessionaire and not of the City. Concessionaire shall select the number, function, qualifications, compensation, including benefits (if any), and may, at its discretion and at any time, adjust or revise the terms and conditions relating to such employees and/or independent contractors.

8.2 Concessionaire and its employees and/or independent contractors shall wear identification badges and/or uniforms approved by the City during all hours of operation when such employee or independent contractor is acting within the scope of such employment or such independent contractor relationship. All employees and/or independent contractors shall observe all the graces of personal grooming. The Concessionaire shall hire people to work in its concession operation who are neat, clean, well groomed and shall comport themselves in a professional and courteous manner. The Concessionaire and any persons hired by same, shall never have been convicted of a felony. If Concessionaire materially fails to comply with this provision the City may send notice of default. The Concessionaire shall have an experienced manager or assistant manager(s) overseeing the concession operations at all times, in the Concession Area or immediately available.

SECTION 9. HOURS OF OPERATION.

The Concession Area and concession operations thereon shall be open every day of the year, weather or events of force majeure permitting, and shall be open no earlier than 11:00 AM, and close no later than 5:00 AM. Any change in the hours of operation shall be at the City's sole option and discretion, and any request by Concessionaire for an increase or decrease in same shall be subject to the prior written approval of the City Manager or his designee. Notwithstanding the preceding sentences, public access to the Concession Area, before the Concessionaire opens for business, shall be governed by rules generally applicable to City parks.

SECTION 10. MAINTENANCE.

10.1 Concessionaire's Covenant to Maintain.

The Concessionaire accepts the use of the Concession Area provided in this Agreement in its "as is" condition. Concessionaire assumes sole responsibility and expense for maintenance of the Concession Area and all facilities and equipment therein (including but not limited to, the proposed storage facility contemplated in Subsection 3.3, and any capital

improvement(s) made pursuant to Subsection 4.6), and any and all public areas adjacent to and surrounding the Concession Area as delineated in Exhibit A attached hereto. Concessionaire covenants and agrees with the City that during the term of this Agreement, including renewal terms, Concessionaire will keep in good state of maintenance and repair any and all equipment, buildings, other facilities and structures, landscaping, and any and all other improvements constructed upon or otherwise located upon or within the Concession Area; nor will Concessionaire suffer or permit any strip, waste, neglect, or deterioration of any of the aforementioned to be committed; and the Concessionaire will repair, replace and renovate the Concession Area, and improvements located thereon, as often as shall be necessary to keep it in a first class state of repair and condition.

Concessionaire further assumes sole responsibility and expense for the daily removal of litter, garbage and debris in and around the Concession Area, and the areas mentioned above. Daily maintenance shall be accomplished 365 days per year. Concessionaire agrees, also at its sole cost and expense, to pay for all garbage disposal generated by its operations.

10.2

Garbage Receptacles.

With respect to litter, garbage and debris removal, the Concessionaire shall provide, at its sole cost and expense, receptacles within the confines of the Concession Area and shall provide a sufficient number of these receptacles for its own use and for the use of the public. Disposal of the contents of said receptacles and removal of litter, garbage and debris within the Concession Area, shall be done on a daily basis, and shall be the sole responsibility of the Concessionaire. At all times during the term of this Agreement, Concessionaire shall maintain an agreement with a trash hauler for garbage disposal and, if requested, provide a copy of such agreement to the City. Any costs for removal of the contents of said trash receptacles by the City, because of the Concessionaire's, or waste contractor's failure to do the same, will be assessed upon, and become the responsibility of the Concessionaire. The dumping or disposal of any refuse, discards, trash or garbage, generated by, or as a result of the concession operations, into any City or Miami-Dade County trash receptacles, by the Concessionaire (including its staff and employees), shall be strictly prohibited. Determination of the "number" of receptacles shall at all times be within the City's sole discretion, and Concessionaire agrees to be bound by same.

10.3

Equipment and Furnishing.

The Concessionaire must provide and maintain, at its own cost and expense, all equipment and furnishings required for the operation and maintenance of the concession. In the event any of the aforesaid items are lost, stolen, or damaged, they shall be immediately replaced or repaired at the sole cost and expense of the Concessionaire.

10.4

Orderly Operation.

Intentionally Omitted.

10.5

No Dangerous Materials.

The Concessionaire agrees not to use or permit in the Concession Area or facilities the storage and/or use of gasoline, fuel oils, diesel, illuminating oils, oil lamps, combustible powered electricity producing generators, turpentine, benzene, naphtha, propane, natural gas, or other similar substances, combustible materials, or explosives of any kind, or any substance or thing prohibited in the standard policies of fire insurance companies in the State of Florida. Any such substances or materials found within the Concession Area shall be immediately removed. Notwithstanding the foregoing, Concessionaire may request prior written approval for the temporary, non-permanent use of outdoor heat lamps and barbeque grill as reflected in the attached site plan (Exhibit A).

Notwithstanding any contrary provisions of this Agreement, Concessionaire, after the Commencement Date, shall indemnify and hold City harmless from any loss, damage, cost, or expense of the City, including, without limitation, reasonable attorney's fees, incurred as a result of, arising from, or connected with the placement by Concessionaire, after the Commencement Date, but during the term of this Agreement, of any "hazardous substance" or "petroleum products" on, under, in or upon the Concession Area as those terms are defined by applicable Federal and State Statute, or any environmental rules and environmental regulations promulgated thereunder; provided, however, Concessionaire shall have no liability in the event of the willful misconduct or gross negligence of the City, its agents, servants or employees. The provisions of this Subsection 10.5 shall survive the termination or earlier expiration of this Agreement.

10.6

Security.

The Concessionaire shall be responsible for and provide reasonable security measures which may be required to protect the Concession Area and any of the equipment, materials and facilities thereon. Under no circumstances shall the City be responsible for any stolen or damaged equipment, materials and facilities, nor shall City be responsible for any stolen or damaged personal property of Concessionaire's patrons, guests, invitees, and/or other third parties.

10.7

Vehicles.

Intentionally Omitted.

10.8

Inspection.

The Concessionaire agrees that the Concession Area and all facilities, equipment, and operations thereon may be inspected at any time by the City Manager or his designee, or by any other Municipal, County, State officer, or agency having responsibilities for inspections of such operations. The Concessionaire hereby waives all claims against the City for compensation for loss or damage sustained by reason of any interference (which interference, if by the City, must be reasonable) with the concession operation by any public agency or official in enforcing their duties or any laws or ordinances. Any such interference (which interference, if by the City, must be reasonable) shall not relieve the Concessionaire from any obligation

hereunder.

SECTION 11. INSURANCE.

Concessionaire shall maintain, at its sole cost and expense, the following types and levels of insurance coverage at all times throughout the term of this Agreement.

- a. Comprehensive General Liability Insurance in the minimum amount of One Million (\$1,000,000) Dollars per occurrence for bodily injury and property damage. This policy must also contain coverage for premises operations, products and contractual liability.
- b. Liquor Liability Insurance in the minimum amount of One Million (\$1,000,000) Dollars.
- c. Workers Compensation Insurance shall be required in accordance with the Laws of the State of Florida.

The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days prior written notice to the City, and then only subject to the prior written approval of the City Manager or his designee. Prior to execution of this Agreement by the parties hereto, Concessionaire shall provide City with a Certificate of Insurance for each such policy. ALL POLICIES SHALL NAME THE CITY OF MIAMI BEACH FLORIDA AS AN ADDITIONAL NAMED INSURED. All such policies shall be obtained from companies authorized to do business in the State of Florida with an A.M. Best's Insurance Guide (latest edition) rating acceptable to the City's Risk Manager, and any replacement or substitute company shall also be subject to the approval of the City's Risk Manager. Should Concessionaire fail to obtain, maintain or renew the policies of insurance referred to above, in the required amounts, the City may, at its sole discretion, obtain such insurance, and any sums expended by City in obtaining said insurance, shall be repaid by Concessionaire to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If Concessionaire fails to repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) until paid, and such failure shall be deemed an event of default hereunder.

SECTION 12. INDEMNITY.

- 12.1 In consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its agents, servants and employees from and against any claim, demand or cause of action of whatsoever kind or nature arising out of error, omission, or negligent act of Concessionaire, its subconcessionaire(s), agents, servants or employees in the performance of services under this Agreement.
- 12.2 In addition, in consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold

harmless and defend the City, its agents, servants and employees from and against any claim, demand or cause of action of whatever kind or nature arising out of any misconduct of Concessionaire not included in the paragraph in the Subsection above and for which the City, its agents, servants or employees are alleged to be liable.

12.3 Subsections 12.1 and 12.2 shall survive the termination or expiration of this Agreement. Subsections 12.1 and 12.2 shall not apply, however, to any such liability, that arises as a result of the willful misconduct or gross negligence of the City, its agents, servants or employees.

12.4 Subrogation.

The terms of insurance policies referred to in Section 11 shall preclude subrogation claims against Concessionaire, the City and their respective officers, employees and agents.

12.5 Force Majeure.

Neither party shall be obligated to perform hereunder and neither party shall be deemed to be in default if performance is prevented by:

- a. fire which renders at least thirty percent (30%) of the Concessionaire Area's cumulative facilities and equipment unusable and which is not caused by negligence of Concessionaire;
- b. earthquake; hurricane; flood; act of God; direct act of terrorism; or civil commotion occurring on the Concession Area; or
- c. any law, ordinance, rule, regulation or order of any public or military authority stemming from the existence of economic or energy controls, hostilities, or war.

The parties hereto acknowledge that Concessionaire's obligations and benefits hereunder may be negatively affected by an event of Force Majeure. If an event of Force Majeure occurs during a contract year, and provided further that Concessionaire's minimum guarantee payment(s) to the City for that contract year is greater than the applicable percentage payment, then the City Manager or his designee, in his sole discretion, may extend the term of this Agreement for a reasonable period of time; provided, however, such extension shall take effect only if Concessionaire agrees to such extension.

12.6 Labor Dispute.

In the event of a labor dispute which results in a strike, picket or boycott affecting the Concession Area or operation described in this Agreement, Concessionaire shall not thereby be deemed to be in default or to have breached any part of this Agreement, unless such dispute shall have been caused by illegal labor practices or violations by Concessionaire of applicable collective bargaining agreements and there has been a final determination of such fact which is not cured by Concessionaire within thirty (30) days.

12.7

Waiver of Loss from Hazards.

The Concessionaire hereby expressly waives all claims against the City for loss or damage sustained by the Concessionaire resulting from fire, water, natural disasters/acts of God (e.g. hurricane, tornado, etc.), civil commotion, riot, or any other Force Majeure contemplated in Subsection 12.5 and Labor Dispute in Subsection 12.6 above, and the Concessionaire hereby expressly waives all rights, claims, and demands against the City and forever releases and discharges the City of Miami Beach, Florida, from all demands, claims, actions and causes of action arising from any of the aforesaid causes.

SECTION 13. DEFAULT AND TERMINATION.

Subsections 13.1 through 13.4 shall constitute events of default under this Agreement. An event of default by Concessionaire shall entitle City to exercise any and all remedies described as City's remedies under this Agreement, including but not limited to those set forth in Subsection 13.5 and Section 14. An event of default by City shall entitle Concessionaire to exercise any and all remedies described as Concessionaire's remedies under this Agreement, including but not limited to those set forth in Subsection 13.6.

13.1

Bankruptcy.

If either the City or Concessionaire shall be adjudged bankrupt or insolvent, or if any receiver or trustee of all or any part of the business property of either party shall be appointed, or if any receiver of all or any part of the business property shall be appointed and shall not be discharged within sixty (60) days after appointment, or if either party shall make an assignment of its property for the benefit of creditors, or shall file a voluntary petition in bankruptcy, or insolvency, or shall apply for reorganization or arrangement with its creditors under the bankruptcy or insolvency laws now in force or hereinafter enacted, Federal, State, or otherwise, or if such petitions shall be filed against either party and shall not be dismissed within sixty (60) days after such filing, then the other party may immediately, or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.2

Default in Payment.

In the event Concessionaire fails to submit any payment within five (5) days of its due date, there shall be a late charge of \$50.00 per day for such late payment, in addition to interest at the highest rate allowable by law (currently 12% per annum). If any payment and accumulated penalties are not received within fifteen (15) days after the payment due date, and such failure continues three (3) days after written notice thereof, then the City may, without further demand or notice, terminate this Concession Agreement without being prejudiced as to any remedies which may be available to it for breach of contract; and may begin procedures to collect the Performance Bond required in Section 14 herein.

13.3

Non-Monetary Default.

In the event that Concessionaire or the City fails to perform or observe any of the covenants, terms or provisions under this Agreement, and such failure

continues thirty (30) days after written notice thereof from the other party hereto, such non-defaulting party may immediately or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract. In the event that a default is not reasonably susceptible to being cured within such period, the defaulting party shall not be considered in default if it shall, within such period, commence with due diligence and dispatch to cure such default and thereafter completes with dispatch and due diligence the curing of such default, but in no event shall such extended cure period exceed ninety (90) days from the date of written notice thereof. In the event Concessionaire cures any default pursuant to this Subsection, it shall promptly provide City with written notice of same.

13.4 Default under Pier Park Restaurant Lease Agreement.

If a default by Concessionaire under the Pier Park Restaurant Lease Agreement shall have occurred and be continuing beyond any applicable cure period, the City may immediately terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.5 City's Remedies for Concessionaire's Default.

If any of the events of default, as set forth in this Section, shall occur, the City may, after notice (if required) and the expiration of cure periods, as provided above, at its sole option and discretion, institute such proceedings as in its opinion are necessary to cure such defaults and to compensate City for damages resulting from such defaults, including but not limited to the right to give to Concessionaire a notice of termination of this Agreement. If such notice is given, the term of this Agreement shall terminate upon the date specified in such notice from City to Concessionaire. On the date so specified, Concessionaire shall then quit and surrender the Concession Area to City pursuant to the provisions of Subsection 13.8. Upon the termination of this Agreement, all rights and interest of Concessionaire in and to the Concession Area and to this Agreement, and every part thereof, shall cease and terminate and City may, in addition to any other rights and remedies it may have, retain all sums paid to it by Concessionaire under this Agreement, including but not limited to, beginning procedures to collect the Performance Bond in Section 14 herein. In addition to the rights set forth above, City shall have the rights to pursue any and all of the following:

- a. the right to injunction or other similar relief available to it under Florida law against Concessionaire; and or
- b. the right to maintain any and all actions at law or suits in equity or other proper proceedings to obtain damages resulting from Concessionaire's default.

13.6 If an event of default, as set forth in this Section, by the City shall occur, the Concessionaire may, after notice (if required) and the expiration of the cure periods, as provided above, at its sole option and discretion, terminate this Agreement upon written notice to the City and/or sue for damages. Said

termination shall become effective upon receipt of a written notice of termination by the City, but in no event shall Concessionaire specify a termination date that is less than sixty (60) days from the date of the written termination notice. On the date specified in the notice, Concessionaire shall quit and surrender the Concession Area to City pursuant to the provisions of Subsection 13.8.

13.7 Termination for Convenience.

13.7.1 Notwithstanding the provisions of this Section 13, this Agreement may be terminated by the City, for convenience and without cause, upon the furnishing of one hundred and eighty (180) days written notice to Concessionaire.

13.7.2 In the event of termination by City of the Agreement pursuant to this Subsection, Concessionaire herein acknowledges and agrees that it shall not have any claim, demand, or cause of action of whatsoever kind or nature, against the City, its agents, servants and employees (including, but not limited to, claims for interference in business or damages for interruption of services or interference in its concession operations).

13.7.3 In the event this Agreement is terminated for convenience by the City, the City and Concessionaire agree to amend the Pier Park Restaurant Lease Agreement, if required, to provide that (i) Concessionaire shall no longer be required to pay the 6.5% MG amount under the Lease, and (ii) that Concessionaire shall resume payment under the Pier Park Restaurant Lease Agreement of the maximum amount equal to 3.5% of gross receipts (said 3.5% amount being the amount referenced in the Lease prior to execution of this Agreement by the parties).

13.8 Surrender of Concession Areas.

At the expiration of this Agreement, or in the event of a termination for convenience pursuant to Subsection 13.7, or in the event this Agreement is otherwise declared null and void and of no further force or effect, Concessionaire shall surrender the Concession Area in the same condition as the Concession Area was prior to the commencement of this Agreement, reasonable wear and tear excepted. In the event of termination of this Agreement pursuant to Subsections 13.1 through 13.4, Concessionaire shall surrender the Concession Area and restore same to a satisfactory condition, as shall be determined solely by the City in its reasonable discretion and judgment. Concessionaire shall remove all its non-permanent facilities, equipment, fixtures, personal property, etc., upon forty-eight (48) hours written notice from the City Manager or his designee unless a longer time period is agreed to by the City. Concessionaire's obligation to observe or perform this covenant shall survive the expiration or other termination of this Agreement. Continued occupancy of the Concession Area after termination of the Agreement shall constitute trespass by the Concessionaire, and may be prosecuted as such. In addition, the Concessionaire shall pay to the City

one thousand dollars (\$1,000) per day as liquidated damages for such trespass and holding over.

SECTION 14. PERFORMANCE BOND OR ALTERNATE SECURITY.

Concessionaire shall, no later than September 1, 2004, furnish to the City Manager or his designee a Performance Bond in the penal sum as stated below for the payment of which Concessionaire shall bind itself for the faithful performance of the terms and conditions of this Agreement. A Performance Bond in the amount of One Hundred Thousand Dollars (\$100,000.00) shall be required and be in faithful observance of this Agreement. A cash deposit, irrevocable letter of credit, or certificate of deposit may also suffice, as determined by the City Manager or his designee in his reasonable discretion. The form of the Performance Bond or letter of credit shall be as required by the City Manager or his designee. In the event that a Certificate of Deposit is approved, it shall be a One Hundred Thousand Dollar (\$100,000.00) one-year Certificate of Deposit in favor of the City, which shall be automatically renewed, the original of which shall be held by City. Concessionaire shall be so required to maintain said Performance Bond or alternate security, as accepted by the City Manager or his designee, in full force and effect until such time as Concessionaire has satisfactorily completed Concessionaire's Capital Improvements (CCI), in such amount as required pursuant to Subsection 4.3(ii). Upon said completion, Concessionaire's Performance Bond requirement shall be deemed satisfied and no further bond or alternate security shall be required pursuant to this Section. Concessionaire shall have an affirmative duty to notify the City, in writing, in the event said Performance Bond or alternate security lapses or otherwise expires. All interest that accrues in connection with any financial instrument or sum of money referenced above shall be the property of Concessionaire, except in an event of default, in which case the City shall be entitled to all interest that accrues after the date of default. In the event of any other default and cure under this Agreement, the City Manager may reinstate this requirement.

SECTION 15. ASSIGNMENT.

Except as otherwise provided in this Subsection, Concessionaire shall not assign; sublease; grant any concession or license; permit the use of by any other person other than Concessionaire; or otherwise transfer all or any portion of this Agreement and/or of the Concession Area (all of the forgoing are herein after referred to collectively as "transfers"), without the prior written consent of the City, which consent shall not be unreasonably withheld.

Concessionaire shall notify the City of any proposed transfer, prior to consummation of same and the City or the City Manager or his designee, as applicable, shall respond within thirty (30) days. In the event that any such transfer is approved, the transferee shall agree to be bound by all the covenants of this Agreement required of the transferor hereunder. Any transfer made without complying with this Section shall be null, void, and of no effect and shall constitute an act of default under this Agreement. Notwithstanding any such consent, or any permitted transfer under any provision of this Section, unless expressly released by the City, Concessionaire shall remain jointly and severally liable (along with each approved transferee, who shall automatically become liable for all obligations of the transferor hereunder with respect to that portion of the Agreement so transferred), and the City shall be permitted to enforce the provisions of this Agreement directly against Concessionaire or any transferee of the Concessionaire without proceeding in any way

against any other person.

SECTION 16. SPECIAL EVENTS / SPONSORSHIPS.

- 16.1 Concessionaire's proposed uses, as defined in Section 3 herein, do not contemplate the production, promotion or sponsorship by the Concessionaire of special events in any of the Concession Areas. In the event Concessionaire does produce, promote or sponsor a special event in the City, other than those provided for in this Agreement, it shall abide by the City's Special Events Permit Requirements and Guidelines. For any use, other than those provided for in this Agreement, a Special Events Permit may be required and shall be obtained through the City's Department of Tourism and Cultural Development. The City Manager's authorization must be obtained for any such special event.

The City Administration shall evaluate requests for Special Events Permits on a case by case basis, in accordance with the City's Special Event Permit Requirements and Guidelines. In the event that a special event and/or film permit is requested by an entity, other than the Concessionaire, and the proposed special event and/or film/photography activity is scheduled to occur within the Concession Area and would cause the operations within the Area to cease, wholly or partly, and provided Concessionaire is not in default under the Agreement at the time of the request, the request for such special event shall be submitted to the Concessionaire at least fifteen (15) days prior to the event and the City shall obtain Concessionaire's written release, which shall not be unreasonably withheld, for such special event prior to approval thereof. Any revenues derived from such special events by the Concessionaire, whether directly or indirectly, will be considered as part of the gross receipts pursuant to this Agreement.

16.2 City Special Events.

Notwithstanding Subsection 16.1 above, and in the event that the City, at its sole discretion, deems that it would be in the best interest of the City, the City reserves the right to displace the Concessionaire for City produced special events and/or City produced productions. In such cases, the City may request that the Concessionaire cease and desist operations during the term of, and in the area of the special event and/or production, and the Concessionaire shall cease and desist during said term. If the Concessionaire is not required to close, or chooses to remain open without interference to the special event and/or production, if so allowed by the City, Concessionaire agrees to cooperate with the City. If the Concessionaire is allowed to remain open during special events and/or productions, the Concessionaire may be allowed to have in operation its normal daily complement of equipment and staff. "Normal" shall be defined as equipment and staff, approved by the City, that the Concessionaire has available for the public on a normal day, 365 days per year. Such equipment or staff shall not be increased or altered during special events and/or productions without the prior written permission of the City Manager or his designee. To the extent that the normal daily complement of equipment and staff is displaced by the special event and/or production, the Concessionaire may reallocate such

displaced equipment and staff on a pro-rata basis within the Concession Area not being utilized by the special event.

16.3 City acknowledges that Concessionaire has a preference for Concessionaire sponsored events on Sundays which the City will take into consideration prior to approving special events and/or film/photography activities. If Concessionaire's preference changes, Concessionaire shall provide City with written notice of same.

16.4 Notwithstanding anything to the contrary, if a special event occurs in all or any portion of any Concession Area, Concessionaire shall not be liable for any charge, fee or other expense, governmental or otherwise, in connection with such special event.

16.5 Sponsorships.

The City reserves unto itself all present and future rights to negotiate all forms of sponsorship agreements based on the marketing value of any City property, brand, logo and reputation. Any and all benefits derived from a sponsorship agreement based on the marketing value of a city property, brand, logo or reputation belonging exclusively to the City.

Management firms, vendors and all subcontractors to the City, including Concessionaire, are specifically prohibited from creating third party sponsorships based solely or in any part on the marketing value of a city asset or property the subcontractor was hired to manage or operate.

SECTION 17. NO IMPROPER USE.

The Concessionaire will not use, nor suffer or permit any person to use in any manner whatsoever, the Concession Area or facilities for any improper, immoral or offensive purpose, or for any purpose in violation of any Federal, State, County, or Municipal ordinance, rule, order or regulation, or of any governmental rule or regulation now in effect or hereafter enacted or adopted. The Concessionaire will protect, indemnify, and forever save and keep harmless the City, its agents, employees and contractors from and against damage, penalty, fine, judgment, expense or charge suffered, imposed, assessed or incurred for any violation, or breach of any law, ordinance, rule, order or regulation occasioned by any act, neglect or omission of the Concessionaire or any employee or agent regarding the Concession. In the event of any violation by the Concessionaire or if the City or its authorized representative shall deem any conduct on the part of the Concessionaire to be objectionable or improper, the City shall have the right to suspend the operation of the concession should the Concessionaire fail to correct any such violation, conduct, or practice to the satisfaction of the City within twenty-four (24) hours after receiving written notice of the nature and extent of such violation, conduct, or practice, such suspension to continue until the violation is cured. The Concessionaire further agrees not to commence operation during the suspension until the violation has been corrected to the satisfaction of the City.

SECTION 18. PRICE SCHEDULES.

Concessionaire agrees that prices charged for lounging and related equipment rentals, sale of food and beverage service, and any and all other prices charged within the Concession Area will be consistent with the price schedule(s) herein submitted by the Concessionaire and approved by the City and incorporated herein as exhibits to this Agreement. Except for CPI price increases authorized by Subsection 3.1.3, all subsequent price approvals and changes must be approved in writing by the City Manager or his designee. Prices shall be reasonably consistent with those charged for similar items and services in the general vicinity. The City shall have the final right of approval for all such prices and changes, but said right shall not be arbitrarily or unreasonably exercised. The Concessionaire agrees to refrain from the sale or rental of any item identified as prohibited by the City and to sell or rent only those items approved by the City.

SECTION 19. NOTICES.

All notices from the City to the Concessionaire shall be deemed duly served upon receipt, if mailed by registered or certified mail with a return receipt, or hand delivered, to the Concessionaire at the following address:

Mr. Jack Penrod
Penrod Brothers, Inc.
One Ocean Drive
Miami Beach, Florida 33139

With copies to:

Mr. Michael Register
Penrod Brothers, Inc.
One Ocean Drive
Miami Beach, Florida 33139

All notices from the Concessionaire to the City shall be deemed duly served upon receipt, if mailed by registered or certified mail return receipt requested, or hand delivered, to the City of Miami Beach at the following addresses:

City Manager
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

With copy to:

City Attorney
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

The Concessionaire and the City may change the above mailing address at any time upon giving the other party written notification. All notices under this Concession Agreement must be in writing.

SECTION 20. LAWS.

20.1 Compliance.

Concessionaire shall comply with all applicable City, County, State, and Federal ordinances, statutes, rules and regulations, including but not limited to all applicable environmental City, County, State, and Federal ordinances, statutes, rules and regulations.

20.2 Governing Law.

INTENTIONALLY OMITTED.

20.3 Equal Employment Opportunity.

Neither Concessionaire nor any affiliate of Concessionaire performing services hereunder, or pursuant hereto, will discriminate against any employee or applicant for employment because of race, creed, sex, color, national origin, sexual orientation, and disability, as defined in Title I of ADA. Concessionaire will take affirmative steps to utilize minorities and females in the work force and in correlative business enterprises.

20.4 No Discrimination.

The Concessionaire agrees that there shall be no discrimination as to race, sex, sexual orientation, color, creed, national origin, familial status, religion or handicap, in its employment practice or in the operations referred to by this Concession Agreement; and further, there shall be no discrimination regarding any use, service, maintenance, or operation within the Concession Area. All services offered within the Concession Area shall be made available to the public, subject to the right of the Concessionaire and the City to establish and enforce rules and regulations to provide for the safety, orderly operation and security of the Concession Area.

- 20.4.1 Pursuant to Sections 62-90 and 62-91, of Chapter 62, of the Miami Beach City Code entitled "Human Relations", Concessionaire, by executing this Agreement, certifies that it does not discriminate in its membership or policies based on race, color, national origin, religion, sex, sexual orientation, familial status or handicap.

SECTION 21. MISCELLANEOUS.

21.1 No Partnership.

Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture between the City and Concessionaire.

21.2 Modifications.

This Agreement cannot be changed or modified except by agreement in writing executed by all parties hereto. Concessionaire acknowledges that no modification to this Agreement may be agreed to by the City unless approved

by the Mayor and City Commission except where such authority has been expressly provided herein to the City Manager or his designee.

21.3 Complete Agreement.

This Agreement, together with all exhibits incorporated hereto, constitutes all the understandings and agreements of whatsoever nature or kind existing between the parties with respect to Concessionaire's operations, as contemplated herein.

21.4 Headings.

The section, subsection and paragraph headings contained herein are for convenience of reference only and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.

21.5 Binding Effect.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

21.6 Clauses.

The illegality or invalidity of any term or any clause of this Agreement shall not affect the validity of the remainder of the Agreement, and the Agreement shall remain in full force and effect as if such illegal or invalid term or clause were not contained herein unless the elimination of such provision detrimentally reduces the consideration that either party is to receive under this Agreement or materially affects the continuing operation of this Agreement.

21.7 Severability.

If any provision of this Agreement or any portion of such provision or the application thereof to any person or circumstance shall be held to be invalid or unenforceable, or shall become a violation of any local, State, or Federal laws, then the same as so applied shall no longer be a part of this Agreement but the remainder of the Agreement, such provisions and the application thereof to other persons or circumstances, shall not be affected thereby and this Agreement as so modified shall remain in full force and effect.

21.8 Right of Entry.

The City, at the direction of the City Manager, shall at all times during hours of operation, have the right to enter into and upon any and all parts of the Concession Area for the purposes of examining the same for any reason relating to the obligations of parties to this Agreement.

21.9 Not a Lease.

It is expressly understood, acknowledged and agreed by Concessionaire that the Concession Area, nor any part, parcel, building, facility, equipment or space therein, is leased and/or otherwise conveyed and/or transferred to the Concessionaire, that it is a concessionaire and not a lessee; and that the Concessionaire's right to operate the concession upon the Concession Area shall continue only so long as this Agreement remains in effect.

21.10

Signage.

Concessionaire shall provide, at its sole cost and expense, any required signs at its concessions. All advertising, signage and postings shall be approved by the City, and shall be in accordance with all applicable Municipal, County, State and Federal laws and regulations. Any signage posted by Concessionaire on its facilities and equipment shall be subject to the prior approval of the City as to size, shape and placement of same.

21.11

Use of Pier Park.

Pier Park is for the use and enjoyment of the public, for recreation and other public purposes and the public's right to such use shall not be infringed upon by any activity of the Concessionaire. Upon execution of this Agreement, Concessionaire acknowledges the public nature of Pier Park and as such, concession operations and improvements must not restrict, or appear to restrict, access to the general public, or in any way limit the public nature or ambience of the park. The Concessionaire will conduct its operations so as to maintain a reasonably quiet and tranquil environment for the neighborhood surrounding the Concession Area, and make no public disturbances.

21.12

Conflict of Interest.

INTENTIONALLY OMITTED.

21.13

Reasonableness.

Notwithstanding anything to the contrary in this Agreement, including but not limited to references to "sole option" or "sole discretion" or words of similar meaning, in each instance in which the approval or consent or other action of the City Commission or the City Manager or his designee is allowed or required in this Agreement, such approval, consent or other action shall not be unreasonably withheld, conditioned or delayed.

21.14

Procedure for Approvals and/or Consents.

INTENTIONALLY OMITTED.

21.15

No Waiver.

No waiver of any covenant or condition of this Agreement by either party shall be deemed to imply or constitute a waiver in the future of the same covenant or condition or of any other covenant or condition of this Agreement.

21.16

No Third Party Beneficiary.

Nothing in this Agreement shall confer upon any person or entity, including, but not limited to subconcessionaires, other than the parties hereto and their respective successors and permitted assigns, any rights or remedies by reason of this Agreement.

SECTION 22. LIMITATION OF LIABILITY.

The City desires to enter into this Agreement placing the operation and management of the Concession Area(s) in the hands of a private management entity only if so doing the City

can place a limit on its liability for any cause of action for breach of this Agreement, so that its liability for any such breach never exceeds the sum of \$100,000.00. Concessionaire hereby expresses its willingness to enter into this Agreement with a \$100,000.00 limitation on recovery for any action for breach of contract. Accordingly, and in consideration of the separate consideration of \$100,000.00, the receipt of which is hereby acknowledged, the City shall not be liable to Concessionaire for damages to Concessionaire in an amount in excess of \$100,000.00, for any action for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of limitation placed upon the City's liability as set forth in Florida Statutes, Section 768.28.

SECTION 23. VENUE.

This Agreement shall be deemed to have been made and shall be construed and interpreted in accordance with the laws of the State of Florida. This Agreement shall be enforceable in Miami-Dade County, Florida, and if legal action is necessary by either party with respect to the enforcement of any and all the terms or conditions herein, exclusive venue for the enforcement of same shall lie in Miami-Dade County, Florida. **CITY AND CONCESSIONAIRE HEREBY KNOWINGLY AND INTENTIONALLY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING THAT CITY AND CONCESSIONAIRE MAY HEREIN AFTER INSTITUTE AGAINST EACH OTHER WITH RESPECT TO ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE CONCESSION AREA.**

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed, all as of the day and year first above written, indicating their agreement.

PASSED AND ADOPTED THIS 25th day of February, 2004.

Attest:

CITY OF MIAMI BEACH

CITY CLERK

MAYOR

Witness:

PENROD BROTHERS, INC.

Signature

Print Name: _____

**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**

JMG/CMC/JD/rir

F:\DDHP\ASSET\10CEAN.DR\PENROD CONCESSION AGREEMENT.FINAL.DOC



 2-11-04
City Attorney  Date

EXHIBIT A
(Page 1 of 2)
(Survey of Concession Area)

PENDING PUBLIC WORKS

EXHIBIT A
(Page 2 of 2)
(Legal Description of Concession Area)

PENDING PUBLIC WORKS

EXHIBIT 3.1

Furniture Rental

Lounge Chairs	\$20.00 per day
Low Beds	\$20.00 per day
Opium Beds	\$50.00 per day

EXHIBIT 3.1.1

(Lounge Chairs)



EXHIBIT 3.1.1

(Low Beds)

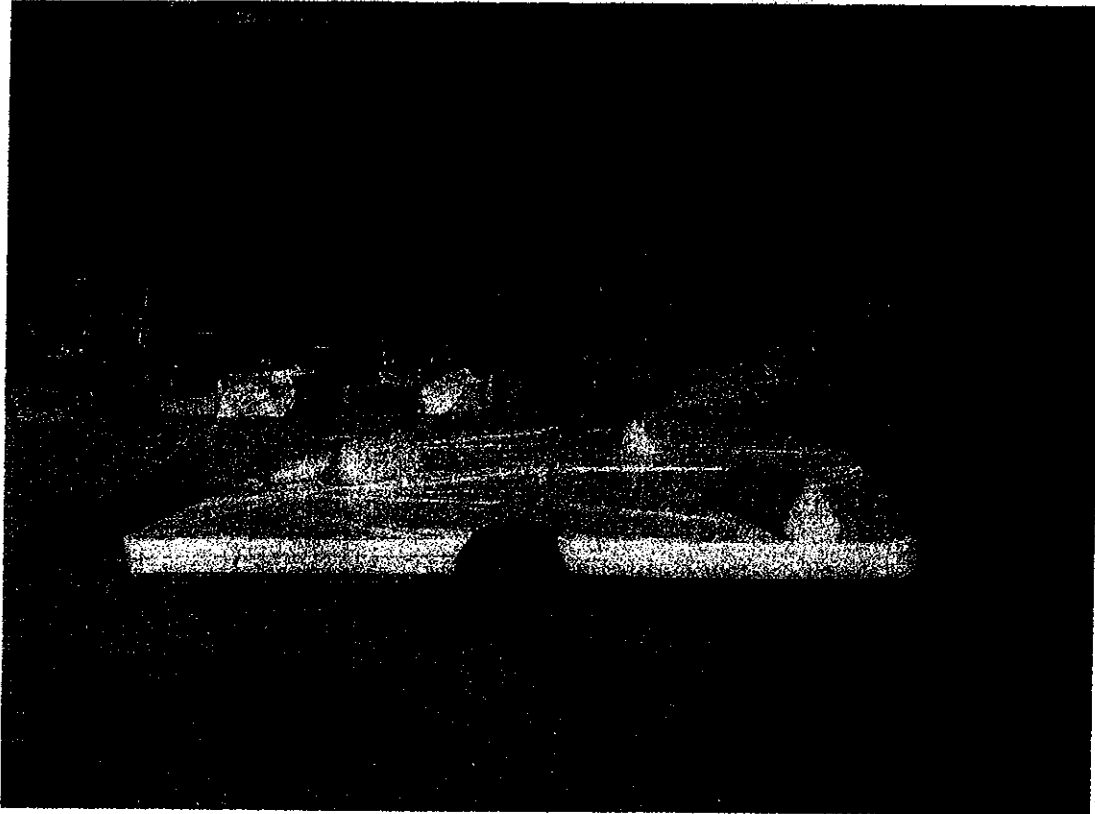


EXHIBIT 3.1.1

(Opium Beds)

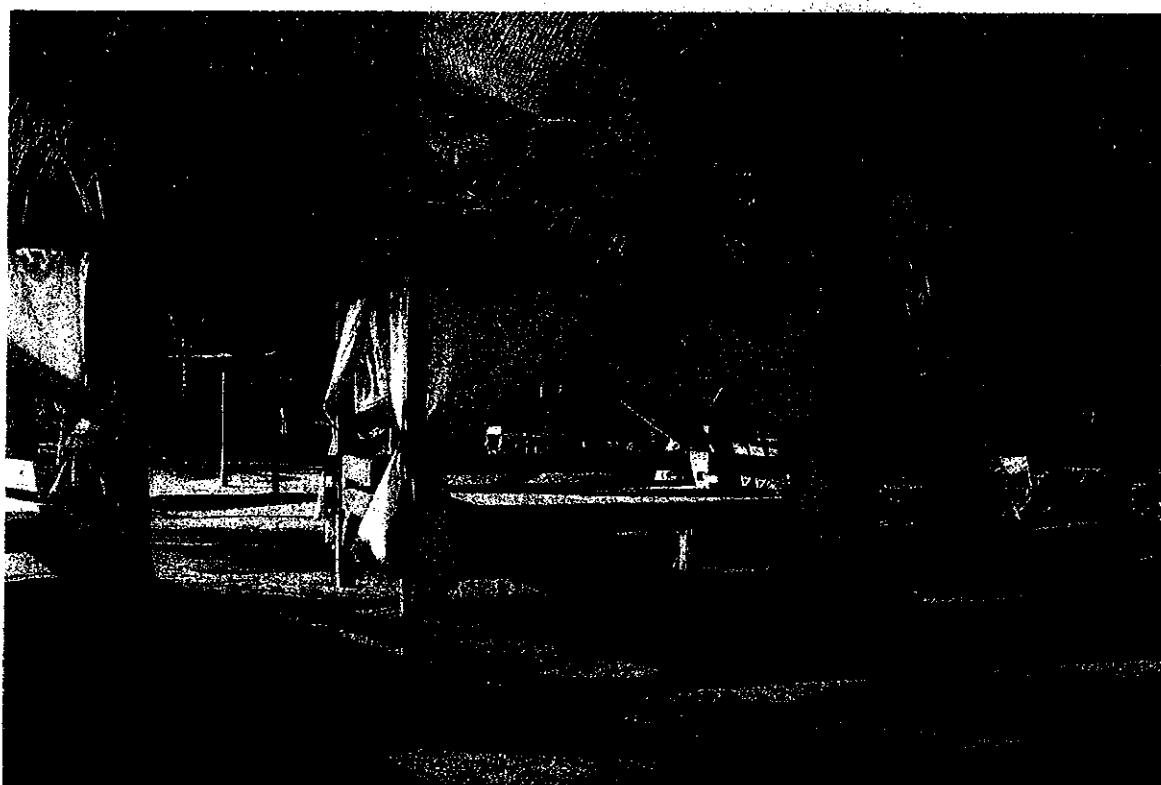


EXHIBIT 3.1.1



EXHIBIT 3.1.1

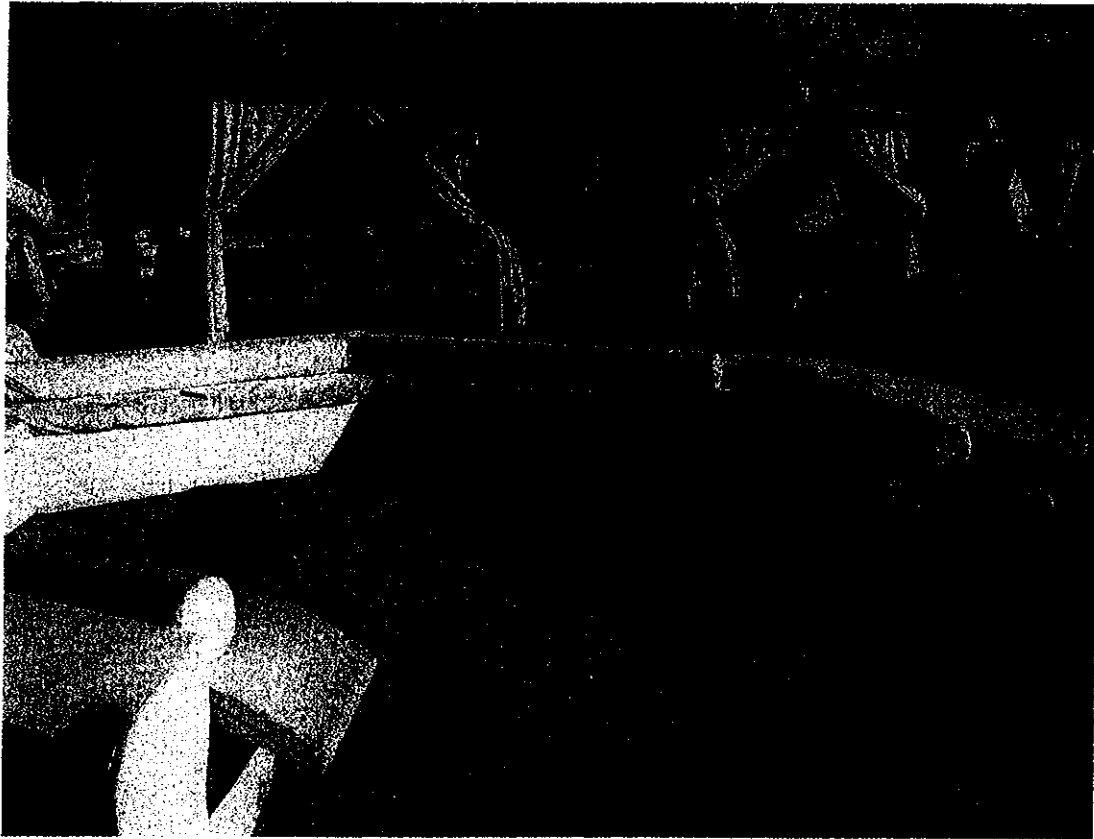


EXHIBIT 3.1.1



EXHIBIT 3.1.1



(Site Plan)

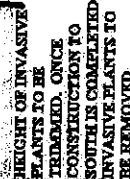


EXHIBIT 3.4

(Hurricane Evacuation Plan)

Hurricane Evacuation Plan

Penrod Brothers, Inc., ("Concessionaire") leases a warehouse facility at 3717 NW7th Ct, Miami, Florida. In the event of a hurricane warning, Concessionaire agrees to move all furniture and other non-permanent fixtures to this warehouse space within the time frame set forth in the agreement between the City of Miami Beach and the Concessionaire for a portion of Pier Park, Miami Beach.

**THIRD AMENDMENT TO THE LEASE AGREEMENT
BETWEEN THE CITY OF MIAMI BEACH
AND
PENROD BROTHERS, INC.**

This Third Amendment to the Lease Agreement, dated November 7, 1985, by and between the City of Miami Beach, a Florida municipal corporation (herein after referred to as "Lessor" or "City"), and Penrod Brothers, Inc., a Florida corporation (herein after referred to as "Lessee" or "Penrod's"), for the property located at One Ocean Drive, Miami Beach, Florida (Premises), is entered into this 25th day of February, 2004.

WITNESSETH

WHEREAS, on October 2, 1985, the Mayor and City Commission adopted Resolution No. 85-18223, approving a Lease Agreement between the City and Penrod Brothers, Inc. (Penrod's) for the development, construction, management and operation of a restaurant facility in Pier Park (the Lease Agreement); and

WHEREAS, on October 2, 1985, the Mayor and City Commission also adopted Resolution No. 85-18222, approving a Concession Agreement, dated November 7, 1985, between the City and Penrod's for the sale of food and beverages and rental of lounging and related equipment to service patrons within a portion of Pier Park adjacent to the Lease Premises (the Pier Park Concession Agreement), which Concession Agreement expired on November 4, 2001; and

WHEREAS, on March 2, 1988, the Mayor and City Commission adopted Resolution No. 88-19178, approving the First Amendment to the Lease Agreement, thereby amending the building footprint and appropriating funds for construction of a portion of the Pier Park parking area; and

WHEREAS, on April 6, 1988, the Mayor and City Commission adopted Resolution No. 88-19211, approving the Second Amendment to the Lease Agreement, thereby revising the site plan (Exhibit A) and legal description (Exhibit B); and

WHEREAS, on November 5, 2001, the City entered into a new concession agreement with Boucher Brothers Miami Beach LLC, as the successful proposer pursuant to Request for Proposals (RFP) No. 22-00/01, for the operation of beachfront concessions on the beaches seaward of Lummus Park, Ocean Terrace and North Shore Open Space Park, but neither said RFP nor the resulting concession agreement with Boucher Brothers addressed the area within a portion of Pier Park adjacent to Penrod's Pier Park restaurant facility (the Lease Premises), which had formerly (since 1985) been operated and managed under the Pier Park Concession Agreement; and

WHEREAS, upon an initial request by Penrod's to continue to operate and manage the concession within the aforesated portion of Pier Park adjacent to the Lease Premises, the Administration has successfully negotiated a concession agreement (the Pier Park

Concession Agreement), and said Agreement was approved by the Mayor and City Commission on February 25, 2004, pursuant to Resolution No. 2004-_____ ; and

WHEREAS, pursuant to the parties' negotiation of the Pier Park Concession Agreement, the City and Penrod's agreed to re-visit and negotiate the financial terms governing the Lease Agreement, particularly with regard to payment of the percentage rent due to the City, and the Concession Agreement, as approved, provides that the City and Penrod's shall amend the Lease Agreement to reflect said renegotiated rent; and

WHEREAS, additionally, the parties wish to correct a long-standing scrivener's error in the exhibits to the Lease Agreement referencing the building footprint (site plan) and the legal description, to correspond with the position of the building as actually constructed, but in no way materially altering or expanding the square footage and/or size of the Leased Premises; and

WHEREAS, accordingly, the parties have negotiated the foregoing Third Amendment to the Lease Agreement.

NOW, THEREFORE, Lessor and Lessee have agreed to enter into this Third Amendment to the Lease Agreement, and amend such Lease as follows:

1. That certain agreement between the City and Penrod Brothers, Inc., entitled "Concession Agreement between City of Miami Beach, Florida, and Penrod Brothers, Inc. for Management and Operation of a Concession in a Portion of Pier Park", as approved on February 25, 2004, by Resolution No. 2004-_____, and having an effective date of October 1, 2003, is attached herein and incorporated hereto as "Exhibit C".
2. Article 13.3, entitled "Percentage Rent", is deleted in its entirety and replaced with the following:

13.3 Minimum Guarantee (MG):

Commencing on October 1, 2003, and thereafter on May 7 of each year during the term of this Lease, as well as any renewal terms, the Lessee shall pay to the City an annual Minimum Guarantee (MG) equal to a percentage of Lessee's gross receipts. The MG shall be payable as monthly percentage rent to the City by the fifteenth (15) day of each month for the preceding month, and said payment shall be accompanied by a statement of gross receipts for the preceding month. At the time of delivery to the City of the Annual Statement of Gross Receipts, as required pursuant to Article 15, Lessee shall also pay to the City any adjustment due the City.

- 13.3.1** For purposes of calculation of any payment and/or increase of MG, as set forth below, and any other term and condition of this Lease relating to the MG, the parties herein acknowledge and agree that,

commencing on October 1, 2003, the base MG dollar amount is established at \$400,000 (annual base MG). Commencing on May 7, 2004, the MG shall be automatically increased, by five percent (5%) per year, from the previous year's MG. Commencing on May 7, 2006, and every fourth Lease year thereafter, the City shall review Lessee's annual gross receipts and recalculate the MG to an amount equal to seventy-five (75%) percent of six and one half (6.5%) percent of the prior three (3) Lease year averages of gross receipts. Said adjusted MG shall be payable as established pursuant to Article 13.3 above, and the annual five (5%) percent increase shall continue to apply to the recalculated MG amount.

13.3.2 Commencing on October 1, 2003, and thereafter on May 7 of each Lease year, in the event that the amount equal to six and one half (6.5%) percent of Lessee's gross receipts, as such term is defined in Article 13.3.3 below, does not meet the MG amount, as established pursuant to Article 13.3.1, then the Lessee shall also pay an additional lump-sum amount to the City, equal to the difference between the percentage of gross receipts amount and the MG amount, as established pursuant to 13.3.1; said amount payable in full at the time of delivery to the City of the Annual Statement of Gross Receipts, or no later than June 30, of each Lease year during the term, including renewal terms, of this Lease.

13.3.3 The term "gross receipts" is understood to mean all income, whether collected or accrued, derived by Penrod's (whether as Lessee herein or as Concessionaire under the Pier Park Concession Agreement, as attached in Exhibit C hereto), or any licensee, sub-concessionaire, or sub-tenant of Penrod's (whether as Lessee herein or as Concessionaire under the Pier Park Concession Agreement), from all business conducted upon or from the Premises, as such term is defined in this Lease, or from the Concession Area, as such term is defined in the Pier Park Concession Agreement, including but not limited to receipts from sale of food, beverages, alcoholic beverages, rental of lounging and related equipment, sale of merchandise, rental of space, including percentage rents, or from any other source whatsoever. The term "gross receipts" shall exclude amounts of any Federal, State, or City sales tax, or other governmental imposition, assessment, charge or expense of any kind, collected by Penrod's and required by law to be remitted to the taxing or other governmental authority.

13.3.4 Prorated MG from October 1, 2003 to May 6, 2004.
Notwithstanding anything contained in this Article 13.3, City and Lessee agree that the MG for the period from October 1, 2003 through May 6, 2004 shall be Two Hundred Thirty Nine Thousand

Three Hundred Forty Four (\$239,344) Dollars. This sum represents the prorated amount based upon the annual base MG of four hundred thousand (\$400,000) dollars.

- 13.3.5 Notwithstanding Article 13.3.2, upon execution of this Third Amendment, and effective retroactively to October 1, 2003, Lessee shall make a monthly MG payment in an amount equal to five and one half (5.5%) percent of Lessee's gross receipts. The monthly 5.5% MG payment amount shall be increased to the required six and one half (6.5%) percent MG payment amount (Article 13.3.2), upon the City's sole determination that Penrod's, both as Lessee herein and as Concessionaire under the Pier Park Concession Agreement, has achieved the "target revenue threshold"; said term herein defined as the amount equal to the average of the Fiscal Year (FY) 2001/2002 (October 1-September 30) and Fiscal Year 2002/2003 gross receipts (as said term is defined in Article 13.3.3).

The parties agree that the target revenue threshold is herein established as the sum of \$12,818,026. This sum is based on the average of gross receipts for FY 2001/2002, which equals the sum of \$12,222,358, and FY 2002/2003 gross receipts, which equals \$13,413,695.

- 13.3.6 Upon Lessee's achievement of the target revenue threshold, Lessee shall pay the lump sum amount to the City, equal to the difference between the 5.5% and 6.5% for the Lease year in which the target revenue threshold was met; said amount payable in full at the time of delivery to the City of Lessee's Annual Statement of Gross Receipts. Thereafter, Lessee shall continue to make MG payments in the required amount of 6.5% of Lessee's gross receipts, as provided by this Article.

- 13.3.7 Reverter in the Event of Economic Downturn.
In the event that Penrod Brothers, Inc., acting as Concessionaire pursuant to the Pier Park Concession Agreement (Exhibit C), deems that, as a result of a downturn in the economy, a financial hardship has occurred for Penrod's (as Concessionaire) such that Penrod's is no longer financially able to remit the MG amount required in Article 13.3.2 of this Lease, Penrod's shall provide the City Manager with a minimum of one hundred eighty (180) days written notice of its intent to terminate the Pier Park Concession Agreement as a result of changed economic circumstances. Upon termination of said Agreement, City and Penrod's agree to amend this Lease, if required, to provide that (i) Penrod's shall no longer be obligated to pay the 6.5% MG amount under the Lease, and (ii) that Penrod's shall resume payment under this Lease of the maximum amount equal to 3.5% of

gross receipts (said 3.5% amount being the amount referenced in the Lease prior to execution of this Third Amendment by the parties).

Additionally, in the event of termination of the Pier Park Concession Agreement pursuant to this Article 13.3.7, Penrod's shall immediately surrender the Concession Area, as defined therein, and restore same to a satisfactory condition, as shall be determined solely by the City in its reasonable discretion and judgment.

3. Article 14, entitled "Gross Receipts", is deleted in its entirety, and the definition of "gross receipts" shall be as defined in Article 13.3.3.
4. "Revised Exhibit A" and "Revised Exhibit B" are hereby replaced, respectively, with a new Exhibit A, entitled "Site Plan", and a new Exhibit B, entitled "Description of Property". Both the new Exhibits A and B reflect the footprint of the Pier Park Restaurant, as actually constructed. Neither the revised Site Plan nor Legal Description in any way, either expressly or by implication, expand and/or enlarge nor contract and/or lessen the Leased Premises, but serve only to correct any inaccuracies in past legal descriptions and/or site plans reflecting the Premises.
5. Except as otherwise specifically amended herein, all other terms and conditions of the Lease Agreement between the Lessor and Lessee shall remain in full force and effect. In the event there is a conflict between the provisions provided herein and the Lease Agreement, the provisions of this Third Amendment shall govern.

IN WITNESS WHEREOF, the parties hereto have caused this Third Amendment to the Lease Agreement to be executed by their duly authorized officials on the day first above indicated.

ATTEST:

CITY OF MIAMI BEACH

CITY CLERK

MAYOR

Witnesses:

PENROD BROTHERS, INC.

Print Name: _____

JMG:CMC:RJA:JD:rlr

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**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**


 2-13-06
City Attorney Date

EXHIBIT A – SITE PLAN

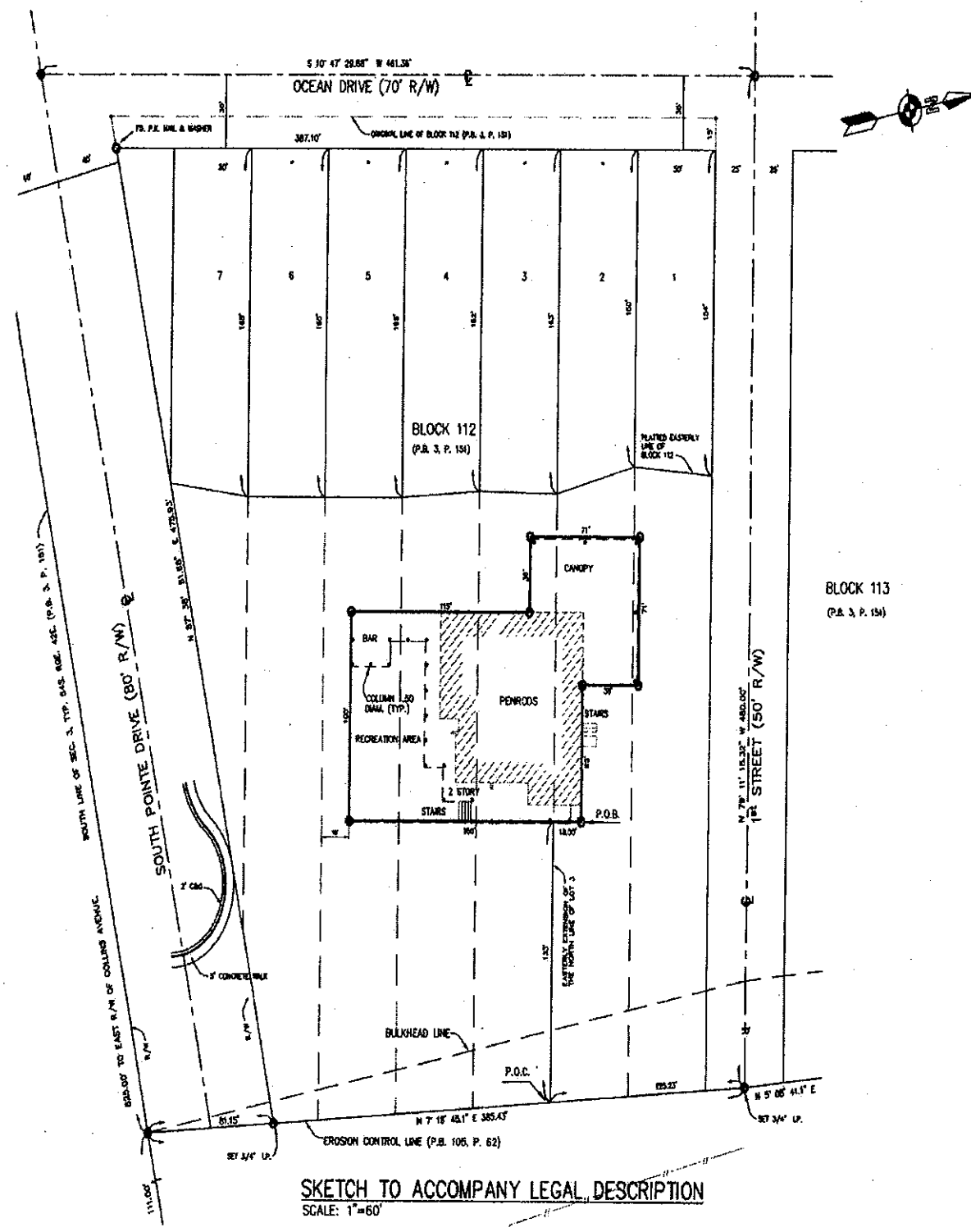


EXHIBIT B – LEGAL DESCRIPTION

A parcel of land located in the easterly extension of lots 1, 2, 3, 4, and 5 of Block 112, OCEAN BEACH ADDITION No. 4, recorded in Plat Book 3, Page 151 of the Public Records of Miami-Dade County, Florida, described as follows:

Commence at the point of intersection of the easterly extension of the north line of Lot 3 of said Block 112 and the Erosion Control Line of the Atlantic Ocean; thence run westerly, along the easterly extension of the north line of said Lot 3 for a distance of 133 feet; thence northerly at right angle with the north line of said Lot 3 for a distance of 18 feet to the POINT OF BEGINNING of the portion of land herein described; thence westerly, parallel to the north line of said Lot 3 for a distance of 65 feet; thence northerly at right angle with the north line of said Lot 3 for a distance of 36 feet; thence westerly, parallel to the north line of said Lot 3 for a distance of 71 feet; thence southerly at right angle with the north line of said Lot 3 for a distance of 71 feet; thence easterly, parallel to the north line of said Lot 3 for a distance of 36 feet; thence southerly, at right angle with the north line of said Lot 3 for a distance of 115 feet; thence easterly 18 feet north (measured at right angle) and parallel to the south line of Lot 5 of the above mentioned Block 112 for a distance of 100 feet; thence northerly, at right angle with the south line of said Lot 5 for a distance of 150 feet to the POINT OF BEGINNING.